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Supreme Court, U.S.
FILED
07-440 SEP 27 2007
OFFICE OF THE CLERK

No. 07-

IN THE

Supreme Court of the United States

WALTER ALLEN ROTHGERY,

Petitioner,

v.

GILLESPIE COUNTY, TEXAS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Sixth Amendment right to counsel attaches when "adversary judicial proceedings have been initiated." *Kirby* v. *Illinois*, 406 U.S. 682, 688 (1972). This Court has held that when a defendant is arrested, "arraigned on [an arrest] warrant before a judge," and "committed by the court to confinement," "[t]here can be no doubt . . . that judicial proceedings ha[ve] been initiated." *Brewer* v. *Williams*, 430 U.S. 387, 399 (1977).

In this case, petitioner was arrested and brought before a magistrate judge who informed petitioner of the accusation against him, found probable cause that he had committed the offense based on a police officer's sworn affidavit, and committed him to jail pending trial or the posting of bail. The question presented is whether the Fifth Circuit correctly held—in a decision that conflicts with those of other federal courts of appeals and state courts of last resort—that adversary judicial proceedings nevertheless had not commenced, and petitioner's Sixth Amendment rights had not attached, because no prosecutor was involved in petitioner's arrest or appearance before the magistrate.

PARTIES TO THE PROCEEDING

The petitioner is Walter Allen Rothgery, the plaintiff and plaintiff-appellant in the courts below. The respondent is Gillespie County, Texas, the defendant and defendant-appellee in the courts below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Walter Allen Rothgery respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

INTRODUCTION

As this Court has repeatedly held, "[w]hatever else it may mean, the right to counsel granted by the Sixth and Fourteenth Amendments means at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him—'whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.'" *Brewer* v. *Williams*, 430 U.S. 387, 398 (1977) (quoting *Kirby* v. *Illinois*, 406 U.S. 682, 689 (1972)).

In *Brewer*, this Court held that "[t]here can be no doubt . . . that judicial proceedings had been initiated," and the Sixth Amendment right to counsel had attached, when a defendant was arrested, made an initial appearance before a court, and was committed by the court to confinement in jail pending trial. *See* 430 U.S. at 399. Subsequently, in *Michigan* v. *Jackson*, 475 U.S. 625 (1986), the Court reaffirmed that this sequence of events triggers the Sixth Amendment right to counsel. *See id.* at 629-632 & n.3. As *Jackson* explained, it is at that time—when a court has confronted a defendant with the charges against him and imposed restrictions on his liberty—that he "finds himself faced with the prosecutorial forces of organized society," and with the need to "rely on counsel as a 'medium' between him and the State." *Id.* at 631-632 (citations omitted).

Since *Brewer* and *Jackson*, the overwhelming majority of courts of appeals and state courts of last resort to address the question have held that when a defendant is arrested, brought before a judge who informs the defendant of the charges against him, and bound over to jail or released on bond, adversary judicial proceedings have commenced and the Sixth Amendment right to counsel has attached.

In this case, the Court of Appeals for the Fifth Circuit joined a small minority of courts to have held otherwise. According to the Fifth Circuit, a defendant has no right to counsel even after he has been arrested, brought before a court to hear the accusation against him, and bound over to custody or released on bail—the sequence of events that *Brewer* and *Jackson* concluded marked the commencement of judicial proceedings—unless he can demonstrate that a prosecutor is aware of or involved in those events.

The relevant facts are undisputed. Petitioner Walter Allen Rothgery was arrested on suspicion of being a felon in possession of a firearm—when he was not, in fact, a felon. Rothgery was brought before a magistrate who informed him of the accusation against him and committed him to jail pending the posting of bail or the disposition of the charges. Although Rothgery requested counsel, none was appointed

until six months following his initial arrest and appearance before the magistrate, after Rothgery had been indicted, had his bail increased, and had been rearrested and jailed. Once appointed, Rothgery's counsel was able to obtain a reduction of bail, and Rothgery was released after serving approximately three weeks in jail on this second arrest. Rothgery's counsel obtained records proving that Rothgery was not a felon, and the charges were dismissed.

Rothgery then filed suit under 42 U.S.C. § 1983 for damages stemming from the denial of his Sixth Amendment right to counsel. The district court rejected Rothgery's claim, and the Fifth Circuit affirmed, holding that Rothgery's Sixth Amendment right to counsel did not attach until he was indicted. The Fifth Circuit acknowledged that, in *Brewer* and *Jackson*, this Court had held that adversary judicial proceedings commenced prior to indictment—after an initial appearance before a magistrate at which the defendant was committed to confinement—"without mentioning whether prosecutors were involved" in that initial appearance. App. 7a. But it nevertheless held that because "prosecutors were not aware of or involved in Rothgery's arrest or appearance before the magistrate," that appearance did not initiate adversary judicial proceedings, and Rothgery's right to counsel did not attach. *Id.*

In so holding, the Fifth Circuit, alone among federal courts of appeals, created a "prosecutorial involvement" test to determine when the Sixth Amendment right to counsel attaches. Its decision represents a square split of authority with other courts of appeals that have addressed the question. It also conflicts with decisions of state courts of last resort that have expressly rejected a prosecutorial involvement test as a matter of federal constitutional law. And it cannot be reconciled with this Court's holdings in *Brewer* and *Jackson*.

The Fifth Circuit's analysis converts the straightforward test for the initiation of adversary judicial proceedings reflected in this Court's longstanding precedent into an unworkably fact-intensive inquiry into what particular

prosecutors knew and when they knew it. Moreover—because defendants often make an initial appearance before a magistrate and are jailed well before formal indictment—under the Fifth Circuit's rule, defendants in that circuit will potentially face protracted incarceration without access to counsel.

In short, in the Fifth Circuit, defendants who have been committed to jail by a court based on the charges against them will have no Sixth Amendment right to counsel unless they can demonstrate a prosecutor's knowledge of, or involvement in, the court-ordered deprivation of liberty—while defendants in other circuits need make no such showing. This disagreement will persist unless and until this Court intervenes. This Court should grant certiorari to clarify that it meant what it said in *Brewer* and *Jackson* and to resolve the clear split of authority among the lower courts on this important question.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 491 F.3d 293 (5th Cir. 2007) (App. 1a-12a). The opinion of the United States District Court for the Western District of Texas is reported at 413 F. Supp. 2d 806 (W.D. Tex. 2006) (App. 13a-31a).

JURISDICTION

The Court of Appeals entered its judgment on June 29, 2007. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

U.S. Const. amend. VI. The Sixth Amendment is applicable to the states through the Fourteenth Amendment.

STATEMENT OF THE CASE

1. *Legal Background.*—This Court has long recognized that the right to appointed counsel is a cornerstone of our criminal justice system. *See, e.g., Powell* v. *Alabama*, 287 U.S. 45, 69 (1932) (a person charged with a crime "requires the guiding hand of counsel at every step in the proceedings against him"); *Johnson* v. *Zerbst*, 304 U.S. 458, 462-463 (1938) (the Sixth Amendment "embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty"). In *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), this Court held that the Sixth Amendment right to appointed counsel is applicable to state criminal proceedings through the Fourteenth Amendment. *See id.* at 342-345. As the Court there explained, it is "an obvious truth" that "in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." *Id.* at 344.

In subsequent cases, this Court set forth a commonsense approach to determining when a defendant's Sixth Amendment right to counsel attaches:

> Whatever else it may mean, the right to counsel granted by the Sixth and Fourteenth Amendments means at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him—"whether by way of formal charge, preliminary hearing, indictment, information, or arraignment."

Brewer, 430 U.S. at 398 (quoting *Kirby*, 406 U.S. at 689).

In *Brewer*, this Court made clear that adversary judicial proceedings can commence, and a defendant's Sixth Amendment right to counsel attach, prior to indictment, at an initial appearance before a magistrate. In that case, the defendant turned himself in to the police after a warrant was issued for his arrest. The next day, he was "arraigned" before a judge

who advised him of his *Miranda* rights and committed him to jail. *Brewer*, 430 U.S. at 391.[1] After that initial appearance, the police elicited incriminating statements from Williams during a long automobile ride, although Williams had indicated that he did not want to speak to the police until he saw his attorney. *See id.* at 392. Those statements were introduced at trial, and the jury found Williams guilty of murder. *See id.* at 393-394.

This Court affirmed the federal habeas court's ruling that the incriminating statements should not have been introduced at trial and held that Williams had been deprived of his Sixth Amendment right to counsel. *See Brewer*, 430 U.S. at 397-398, 406. The Court explained:

> There can be no doubt in the present case that judicial proceedings had been initiated against Williams before the start of the automobile ride. . . . A warrant had been issued for his arrest, he had been arraigned on that warrant before a judge . . . , and he had been committed by the court to confinement in jail.

Id. at 399. *Brewer* thus holds that a defendant's arrest, appearance before a magistrate who informs him of the charges against him, and commitment to custody constitute

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[1] An "arraignment" can refer either to an initial appearance before a magistrate at which a defendant is notified of the accusation against him or to the step in criminal proceedings where, after information or indictment, a defendant must enter a plea. *See* LaFave et al., 1 *Criminal Procedure* § 1.3(k), at 113 n.176 (2d ed. 1999); *id.* § 1.3(o), at 124-125. Thus, an "initial appearance" or "first appearance" before a magistrate may be called in different jurisdictions a "preliminary arraignment," "an arraignment on the warrant," or "an arraignment on the complaint." *Id.* § 1.3(k), at 113. When a defendant, after information or indictment, is brought before a trial court and must enter a plea, the proceeding is often termed an "arraignment on information" or an "arraignment on indictment." *Id.* § 1.3(o), at 124-125. In *Brewer*, Williams had not been indicted and was not asked to enter a plea when he first appeared before the court. This Court noted that he was arraigned on a "warrant," 430 U.S. at 391, 399, indicating that the Court's use of the term "arraignment" in that case refers to the same type of initial court appearance that occurred in this case.

the initiation of adversary judicial proceedings that triggers the Sixth Amendment right to counsel.

This Court confirmed that holding in *Michigan* v. *Jackson*, which consolidated two cases from the Michigan Supreme Court. In both cases, the defendants were arrested, "arraigned" before a magistrate judge, and bound over to jail. *See* 475 U.S. at 627-628. As in *Brewer*, the arraignments in *Jackson* were not post-indictment arraignments at which a defendant enters a plea, but initial appearances before a magistrate, at which a defendant is informed of the accusation against him and his constitutional rights, including the right to counsel, and is committed to jail or released on bond.[2] This Court rejected as "untenable" the state's argument that such an arraignment did not trigger the Sixth Amendment right to counsel. *Id.* at 629 n.3. Rather, the Court confirmed the holding of *Brewer* that arrest, arraignment before a magistrate, and commitment to custody "signal[] 'the initiation of adversary judicial proceedings' and thus the attachment of the Sixth Amendment." *Id.* at 629. As the Court explained, it is at that time that "the government has committed itself to prosecute," and that the "defendant finds himself faced with the prosecutorial forces of organized society." *Id.* at 631 (quoting *United States* v. *Gouveia*, 467 U.S. 180, 189 (1984) (quoting *Kirby*, 406 U.S. at 689)).[3]

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[2] *See* 1A Gillespie, *Michigan Criminal Law and Procedure* § 16:1 (2007) (explaining that "arraignment on the warrant [in Michigan] . . . is the first appearance by the defendant in the case" and provides "formal notice of the charge against the accused; the magistrate informs the accused of the right to counsel and inquiry is made to determine whether the defendant is in need of appointed counsel . . . and the arraigning judge may fix bail"); *see also Owen* v. *State*, 596 So. 2d 985, 988-989 (Fla. 1992) (explaining that when this Court stated in *Kirby* and *Jackson* that the Sixth Amendment right to counsel attaches at "arraignment," it was using the term in the "initial appearance" sense).

[3] *Jackson* also made clear that "[t]he question whether arraignment" or a functionally similar proceeding "signals the initiation of adversary judicial proceedings . . . is distinct from the question whether the ar-

2. *The Facts of This Case.*—On July 15, 2002, Walter Allen Rothgery was arrested without a warrant and booked into the Gillespie County, Texas jail on suspicion of being a felon in possession of a firearm. The arrest was made on the mistaken belief that Rothgery had been convicted of a felony in California.

The next day, Rothgery was brought before a magistrate judge. The arresting officer presented to the magistrate an "Affidavit of Probable Cause" sworn to by the officer, "in the name and by the authority of the State of Texas." App. 33a. The affidavit described the factual basis for the accusation against Rothgery and concluded, "I charge that ... Defendant Walter A. Rothgery did . . . commit the offense of unlawful possession of a firearm by a felon—3rd degree felony [Penal Code §] 46.04 against the peace and dignity of the State." *Id.*

Based on the arresting officer's affidavit, the magistrate judge signed an order finding that probable cause existed for Rothgery's arrest (meaning that probable cause existed to conclude he had committed the crime in question, *see Gerstein* v. *Pugh*, 420 U.S. 103, 111 (1975)). App. 34a. As required by the Texas Code of Criminal Procedure, the magistrate informed Rothgery of the accusation against him and informed him of his rights, including his right to appointed counsel. App. 35a-37a.[4]

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raignment itself is a critical stage requiring the presence of counsel." 475 U.S. at 629 n.3. As in *Jackson*, only the former question is presented here.

[4] Article 15.17 of the Texas Code of Criminal Procedure requires, consistent with this Court's holdings in *Gerstein*, 420 U.S. 103, and *County of Riverside* v. *McLaughlin*, 500 U.S. 44 (1991), that a person placed under arrest must be taken before a magistrate within forty-eight hours. The magistrate is required at that hearing to inform the arrested person of the accusation against him and his right to appointed counsel, and is authorized to set bail. Tex. Code Crim. Proc. arts. 14.06(a), 15.17(a). The Texas code also authorizes a magistrate to commit a defendant to jail. *Id.* arts. 16.20, 17.27(a). Texas magistrates often combine the Article 15.17 proceeding with the commitment proceedings. These combined proceedings are referred to as "magistration," a "magistrate hearing," "arraignment,"

Rothgery inquired about having counsel appointed, but was told that if he wanted to proceed with the hearing and have his bail set that morning, he would have to waive his right to an attorney for purposes of the hearing. Otherwise, Rothgery would have to wait in jail until an attorney was appointed, and only then would the court set bail. Rothgery agreed to waive his right to counsel for the limited purpose of allowing the hearing to continue and permitting the magistrate to set bail. The magistrate recorded Rothgery's temporary waiver, underlining the words "at this time" on the relevant form to document that he was waiving only his right to have counsel present at the hearing. App. 36a.

The magistrate set bail at $5,000 and committed Rothgery to jail pending the posting of bail or the disposition of charges against him. Rothgery posted a surety bond and was released from the county jail. The surety bond, signed by a Gillespie County deputy sheriff, stated that Rothgery "stands charged by complaint duly filed in the Justice of Peace Court" with the felony charge of unlawful possession of a firearm by a felon, and conditioned his release on his personal appearance in court on the charge. App. 39a.

After Rothgery's release on bond, he repeatedly inquired about the status of his request for appointment of counsel. In July 2002, he submitted a written, notarized request to Gillespie County jail officials for appointment of counsel. No counsel was appointed.

On January 17, 2003, a grand jury indicted Rothgery for the offense of unlawful possession of a firearm by a felon. Rothgery's bail was increased to $15,000. He was rearrested due to the bail increase and again brought before the magistrate, where he renewed his request for counsel. Again, no counsel was appointed, and, unable to post bail, Rothgery was committed to the Gillespie County Jail. Three days later, still with no lawyer, he was transferred to the Coman-

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"preliminary hearing," "initial appearance," or, in Texas, imprecisely as an "Article 15.17 hearing."

che County Jail, where he again completed a written request for counsel.

On January 23, 2003, a lawyer finally was appointed to represent Rothgery. The attorney secured an order reducing Rothgery's bail, allowing his release from jail after he had served approximately three weeks due to his second arrest. The attorney also obtained records establishing that Rothgery had not, in fact, been convicted of a felony. Accordingly, the district attorney moved to dismiss the indictment, and the court duly dismissed the charge.

3. *Proceedings Below.*—Rothgery sued Gillespie County under 42 U.S.C. § 1983 on the ground that the County had violated his Sixth Amendment right to counsel, alleging that the County followed a policy of not appointing counsel for indigent defendants released on bond until after indictment or information. Rothgery argued that *Brewer* and *Jackson* established that his Sixth Amendment right to counsel was triggered when he was arrested, brought before the magistrate and informed of the accusation against him, and committed to jail pending posting of bond or disposition of the accusation. Had counsel been appointed after his first appearance before the magistrate, Rothgery contended, the mistake underlying his arrest would have been discovered and he would not have been subject to bond for a lengthy period and wrongfully jailed in January 2003.

The district court granted Gillespie County's motion for summary judgment, holding that Rothgery's Sixth Amendment right to counsel did not attach at his initial appearance before the magistrate. App. 29a-31a. The Fifth Circuit affirmed. App. 2a, 12a. In reaching that determination, the Fifth Circuit recognized that this Court has held that adversary judicial proceedings can be initiated prior to indictment. App. 7a. Nevertheless—relying on *Kirby*'s statement that the right to counsel attaches when "the government has committed itself to prosecute," and the "defendant finds himself faced with the prosecutorial forces of organized society," 406 U.S. at 689—the court held that Rothgery's initial appearance did not trigger his right to counsel because he

had not demonstrated "prosecutorial knowledge of or involvement in [his] arrest and magistrate appearance." App. 12a.[5]

The Fifth Circuit acknowledged that, in *Brewer* and *Jackson*, this Court had held that an initial appearance before a magistrate, who informed the defendant of the charges against him and committed him to confinement, triggered the right to counsel, "without mentioning whether prosecutors were involved." App. 7a. However, it distinguished those cases on the ground that "the state supreme court opinion preceding *Jackson* establishes that the prosecutor's office approved and issued the complaints and warrants that led to the arraignment"—although this Court's opinion in *Jackson* never mentions that fact—and that "while the extent of prosecutorial involvement in *Brewer* was unaddressed, it does not appear that the state . . . raised the issue." App. 7a-8a. Finding no evidence that a prosecutor knew of or was involved in the sequence of events that led to Rothgery's court-imposed loss of liberty, the Fifth Circuit held that Rothgery had no right to counsel prior to his indictment. App. 12a.[6]

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[5] Gillespie County had argued that adversary judicial proceedings did not commence at Rothgery's initial appearance because the affidavit presented to the magistrate was not a "complaint" that formally charged a felony under Texas law. The Fifth Circuit chose not to resolve that issue of state law, noting that "we do not rely formalistically on the label given to a particular pretrial event when determining the point at which adversary judicial proceedings have been initiated," App. 5a, and that although "[w]e look to state law to determine when adversarial proceedings against the accused have commenced," "the ultimate Sixth Amendment consequence[] of certain state procedures is a matter of *federal* law," App. 5a-6a n.6 (emphasis added) (citation omitted). Instead, the Fifth Circuit concluded that, regardless of the answer to "the formalistic question of whether the affidavit here would be considered a 'complaint' or its functional equivalent under Texas . . . law," App. 11a, as a matter of federal law, an initial appearance before a magistrate and commitment to jail could not initiate adversary judicial proceedings unless a prosecutor was aware of or involved in the proceedings. App. 1a-2a, 5a-8a, 12a.

[6] In so holding, the Fifth Circuit relied in part on its own pre-*Jackson* decision in *McGee* v. *Estelle*, 625 F.2d 1206, 1208 (5th Cir. 1980)

REASONS FOR GRANTING THE WRIT

The Fifth Circuit's decision conflicts with the decisions of other federal courts of appeals to consider the issue; splits with the decisions of state courts of last resort that have expressly rejected any such "prosecutorial involvement" test under the Sixth Amendment; and, ultimately, cannot be reconciled with this Court's precedent. Its decision permits defendants in that circuit who cannot demonstrate a prosecutor's involvement in their arrest or first court appearance to be jailed for substantial periods with no access to counsel. Moreover, the Fifth Circuit's reasoning makes clear that the disagreement over this important issue will persist absent this Court's intervention. This Court should grant certiorari.

I. THE FIFTH CIRCUIT'S DECISION CONFLICTS WITH THOSE OF OTHER FEDERAL COURTS OF APPEALS AND STATE COURTS OF LAST RESORT

A. The Fifth Circuit's Decision Conflicts With The Decisions Of Other Federal Courts Of Appeals

The Fifth Circuit's decision squarely conflicts with the holdings of three other federal courts of appeals, all of which have applied *Brewer* and *Jackson* to hold that the Sixth Amendment right to counsel is triggered by the same sequence of events that occurred in Rothgery's case: a defendant's arrest, his appearance before a magistrate who informs him of the charges against him, and his commitment to confinement. None of these courts has held that a prosecutor must be aware of or involved in these events in order for the Sixth Amendment right to attach.

In *Mitzel* v. *Tate*, 267 F.3d 524 (6th Cir. 2001), the Sixth Circuit considered facts indistinguishable from those in Rothgery's case and held that the defendant's right to coun-

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(holding that "an adversary criminal proceeding has not begun in a case where the prosecut[ors] are unaware of either the charges or the arrest"), App. 1a, 6a, concluding that nothing in *Brewer* or *Jackson* was "enough for us to ignore our binding authority," App. 8a.

sel had attached. There, Mitzel voluntarily came to the police station and made statements describing his role in the death of a friend. *See id.* at 527. The police arrested him without a warrant and brought him before a magistrate for his initial appearance, at which he was represented by counsel retained by his father. *See id.* at 528, 532 (citing Ohio R. Crim. P. 4(E)(2) (arrest without warrant)). After the initial appearance, the police elicited a further incriminating statement from the defendant without his counsel present. *See id.* at 528. Mitzel moved to suppress that statement, arguing that his Sixth Amendment right had attached at the initial appearance, barring the police from initiating interrogation in the absence of his lawyer. *See id.* at 531-532.

The Sixth Circuit observed that, by the time the statement in question was made, Mitzel "had been placed under arrest, the police had issued a complaint against him detailing the essential facts of the offense with which he was charged, and he had appeared before a state judge." 267 F.3d at 532. Furthermore, following this "initial appearance in front of the state judge, the court ordered that his confinement in jail continue." *Id.* Accordingly, the Sixth Circuit held that, as in *Brewer*, "'[t]here can be no doubt . . . that judicial proceedings had been initiated.'" *Id.* (quoting *Brewer*, 430 U.S. at 399) (bracket and ellipsis in *Mitzel*).

Like the Fifth Circuit, the Sixth Circuit acknowledged that the purpose of the Sixth Amendment "is to assure that in any criminal prosecution the accused shall not be left to his own devices in facing the prosecutorial forces of organized society." 267 F.3d at 532 (quoting *Moran* v. *Burbine*, 475 U.S. 412, 430 (1986) (quoting *Kirby*, 406 U.S. at 689)). In light of *Brewer*, however, the Sixth Circuit concluded that Mitzel was faced with "the prosecutorial forces of organized society," and that his right to counsel had thus attached, when he was arrested, was brought before a magistrate and informed of the charges against him, and was committed to confinement—the same events that occurred here. *Id.* at 532-533. That was so even though the *police*—not a prosecutor—had made the accusation against Mitzel that led to his

initial appearance, *see id.* at 532, and the court pointed to no evidence that prosecutors had been involved in the arrest or appearance before the magistrate.

Similarly, in *Matteo* v. *Superintendent, SCI Albion*, 171 F.3d 877 (3rd Cir. 1999), the en banc Third Circuit held that the defendant's right to counsel attached when he was arrested, brought before a judge for "preliminary arraignment," and committed to jail. *See id.* at 893. Like the Fifth and Sixth Circuits, the Third Circuit acknowledged that adversary proceedings begin when a defendant "'finds himself faced with the prosecutorial forces of organized society.'" *Id.* at 892 (quoting *Kirby*, 406 U.S. at 689). But, unlike the Fifth Circuit, the Third Circuit interpreted this language in a manner consistent with *Brewer* and *Jackson*, concluding that Matteo was "faced with the prosecutorial forces of organized society," and his Sixth Amendment right to counsel was triggered, upon his initial appearance before the magistrate and commitment to jail—well before the filing of an information by the district attorney and his arraignment on the information. *Id.* at 892-893. The Third Circuit made no mention of any prosecutorial involvement in Matteo's arrest or initial appearance, and made no suggestion that such involvement was relevant.

The Eleventh Circuit has likewise held that the Sixth Amendment right to counsel attaches after the same events that occurred in this case: arrest, an initial appearance before a magistrate, and commitment to custody. In *Fleming* v. *Kemp*, 837 F.2d 940 (11th Cir. 1988), the defendant, Fleming, was arrested and appeared before a justice of the peace who advised him of the charges against him and of his rights, and committed him to jail, setting no bond. *See id.* at 947. A few days later, the police initiated an interrogation of Fleming without counsel present and obtained statements that were admitted at trial. *See id.* In federal habeas proceedings, the warden argued that Fleming's Sixth Amendment rights had not attached when the statements were elicited, because his appearance before the justice of the peace was not a "formal arraignment, and thus falls outside of *Jack-*

son's holding." *Id.* at 947-948. The Eleventh Circuit squarely rejected that argument, holding that, under *Jackson*, a "formal arraignment" is not required in order for adversary judicial proceedings to commence. *See id.* at 948. Rather, the court held that an initial appearance before a judicial officer at which a defendant is informed of the charges against him and committed to custody transforms the defendant from a "suspect" to an "accused" within the meaning of *Jackson* and triggers the defendant's right to counsel. *See id.* Again, the Eleventh Circuit did not discuss whether a prosecutor was involved in Fleming's initial appearance before the justice of the peace and nowhere intimated that a prosecutor's involvement is relevant to the analysis.

The Eleventh Circuit subsequently reaffirmed the rule adopted in *Fleming* in *Stokes* v. *Singletary*, 952 F.2d 1567, 1579 (11th Cir. 1992) (relying on *Brewer* and *Jackson* to hold that defendant's Sixth Amendment right to counsel had attached after arrest and an initial appearance before a magistrate).

B. The Fifth Circuit's Decision Conflicts With The Decisions Of State Courts Of Last Resort

In addition, the Fifth Circuit's analysis conflicts with that of several state courts of last resort that have applied *Brewer* and *Jackson* to hold, as a matter of federal constitutional law, that the Sixth Amendment right to counsel had attached on facts functionally identical to those here. Indeed, two state supreme courts have expressly rejected a "prosecutorial involvement" test for the commencement of adversary judicial proceedings.

For instance, before this Court's decision in *Jackson*, the Georgia Supreme Court had adopted a rule that an initial appearance before a magistrate, at which no prosecutor was present, did not initiate adversary judicial proceedings. *See Ross* v. *State*, 326 S.E.2d 194, 200 (Ga. 1985), *overruled by O'Kelley* v. *State*, 604 S.E.2d 509 (Ga. 2004). When later confronted with the same fact scenario, the Georgia court rec-

ognized that its rule could no longer stand in light of *Jackson*. In *O'Kelley* v. *State*, 604 S.E.2d 509 (Ga. 2004), the Georgia court held that under *Jackson*, a "formal legal proceeding" triggers the Sixth Amendment right to counsel, regardless of whether a prosecutor is involved in that proceeding. *See id.* at 511. The court expressly noted that no prosecutor was present at the appearance in *O'Kelley*, and its opinion nowhere indicated that a prosecutor had been involved in the arrest. *See id.* Nevertheless, the court held, the "Sixth Amendment right to counsel attaches at an initial appearance hearing." *Id.* at 512. In doing so, the court expressly overruled *Ross* and rejected prosecutorial involvement as the yardstick for determining whether judicial proceedings had been initiated. *See id.* at 511-512.

Similarly, in *State* v. *Jackson*, 380 N.W.2d 420 (Iowa 1986), the Supreme Court of Iowa held that a defendant's Sixth Amendment right to counsel attached after he was arrested, made an initial appearance before a court, and was committed to jail. *See id.* at 424. The Iowa court expressly rejected the state's contention that the defendant's right to counsel did not attach after the initial appearance because there was no "participation by a prosecuting attorney in the proceedings." *Id.* at 423. The court observed that the case was "indistinguishable in principle from *Brewer*," where this Court held that adversary judicial proceedings had been initiated even though "no participation by a prosecuting attorney was shown." *Id.* at 424.[7]

Moreover, numerous state courts have applied *Brewer* and *Jackson* to hold that adversary judicial proceedings

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[7] The Iowa Supreme Court did note that the participation of a prosecutor in the investigative stages of a criminal proceeding is "some evidence" of a commitment to prosecute, but, unlike the Fifth Circuit, held that such participation was "not determinative." *Id.* at 423. And the Iowa court clearly held that even where there was *no* evidence of prosecutorial awareness or participation, arrest, magistration, and commitment to custody—the same events that occurred here—constituted the commencement of adversary judicial proceedings and triggered the Sixth Amendment right to counsel. *See id.* at 424.

commence when a defendant is accused of a felony offense, appears before a judge, and is bound over to jail or released on conditions of bail. For example, in *State* v. *Tucker*, 645 A.2d 111 (N.J. 1994), the Supreme Court of New Jersey recognized that, under *Jackson*, the Sixth Amendment right to counsel attached at a "first court appearance," *id.* at 119, even though the opinion nowhere suggested that a prosecutor had been involved in any stage before the initial appearance and "the State was almost always unrepresented at initial appearances in municipal court," *id.* at 123; *see also, e.g.*, *Bradford* v. *State*, 927 S.W.2d 329, 333-334 (Ark. 1996) (holding that *Jackson* compels the conclusion that adversary judicial proceedings have been initiated after a defendant is arrested, brought before a magistrate who determines probable cause for the detention, and bound over to custody); *Owen* v. *State*, 596 So. 2d 985, 988-989 (Fla. 1992) (relying on this Court's precedent to hold that adversary judicial proceedings "clearly have begun when an accused is placed in custody, haled before a magistrate on a warrant or formal complaint, and then tentatively charged with a particular crime at this initial appearance or 'arraignment'"); *State* v. *Barrow*, 359 S.E.2d 844, 848 (W. Va. 1987) (relying on *Jackson* to hold that the Sixth Amendment right to counsel attached when the defendant was arrested and made an initial appearance before a magistrate who committed him to custody).

By contrast, a minority of state supreme courts have held, on facts similar to those of this case, that the Sixth Amendment right to counsel was not triggered. For instance, in *Ex parte Stewart*, 853 So. 2d 901 (Ala. 2002), the defendant was arrested and made an initial appearance before a court which informed him of the charges against him, informed him of his right to counsel and other rights, and set bail. *See id.* at 902, 904. In a 5-3 decision, the Supreme Court of Alabama held that because this proceeding was merely "an informational proceeding designed to protect the rights of the accused," and not an "adversarial proceeding," the Sixth Amendment right to counsel had not attached. *Id.* at 904-905. The three justices in dissent recognized that the

majority's conclusion diverged from authority in other jurisdictions. Relying on the Eleventh Circuit's decision in *Stokes*, 952 F.2d 1567, and on the Florida Supreme Court's decision in *Owen*, 596 So. 2d 985, they concluded that because the judicial officer could set bail and commit the defendant to custody at the initial appearance, the defendant was certainly "confronted by the 'procedural system,'" and his Sixth Amendment right had attached. *Stewart*, 853 So. 2d at 909 (Lyons, J., dissenting) (citation omitted).[8]

* * * * *

In sum, under the analysis employed by the Third, Sixth, and Eleventh Circuits—as well as numerous state courts of last resort—Rothgery's Sixth Amendment rights would have been deemed to attach following his initial appearance before the magistrate, at which he was informed of the charges against him and committed to confinement. None of the other courts of appeals has employed the Fifth Circuit's "prosecutorial involvement" test or, indeed, hinted that a prosecutor's involvement is relevant. And two state supreme courts have expressly rejected the notion that a prosecutor's involvement could be dispositive. Moreover, the Fifth Circuit's express adherence to its own prior precedent employing the prosecutorial involvement analysis, even in light of this Court's subsequent decision in *Jackson*, *see supra* n.6, makes clear that this division of authority will not be resolved absent this Court's intervention.

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[8] Similarly, in *People* v. *Anderson*, 842 P.2d 621 (Colo. 1992), the Supreme Court of Colorado held that an initial appearance before a county judge under a Colorado rule that required the judge to advise the defendant of the charges against him, his right to counsel, and the amount of bail did not initiate adversary judicial proceedings and did not trigger the defendant's Sixth Amendment right to counsel, because "at that time the People had not elected to prosecute the defendant." *Id.* at 623.

II. THE FIFTH CIRCUIT'S ANALYSIS CANNOT BE RECONCILED WITH THIS COURT'S SIXTH AMENDMENT PRECEDENT

The Fifth Circuit's analysis cannot be reconciled with this Court's decisions in *Brewer* and *Jackson*. In both of those cases, the Court held that a defendant's arrest, initial appearance before a judge who informed him of the charges against him, and commitment to confinement—the very events that occurred in Rothgery's case—marked the commencement of adversary judicial proceedings and triggered the defendant's Sixth Amendment right to counsel. *See Brewer*, 430 U.S. at 399; *Jackson*, 475 U.S. at 629.[9] In neither case did the Court consider it relevant whether a prosecutor was involved in, or aware of, the proceedings.

Rather, *Brewer* squarely held, without reference to prosecutorial involvement, that "[t]here can be no doubt . . . that judicial proceedings had been initiated" after the defendant had been arrested, "had been arraigned on [the arrest] warrant before a judge," and "had been committed by the court to confinement in jail." 430 U.S. at 399. The Fifth Circuit attempted to distinguish *Brewer* by stating that "it does not appear that the state contested that adversary judicial proceedings had begun." App. 8a. But this Court did not rest its decision on a concession by the state; rather, it explicitly held that adversary judicial proceedings had in fact commenced and the Sixth Amendment right to counsel had in fact attached—even though there was no indication in *Brewer* that any prosecutor was involved in the proceedings. *Id.*; *see also Jackson*, 380 N.W.2d at 424 (Iowa Supreme Court recognized that *Brewer* held that adversary judicial proceedings had been initiated even though "no participation by a prosecuting attorney was shown").

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[9] *See also Owen*, 596 So. 2d at 988-989 ("[T]he federal [Supreme] Court and commentators are in agreement that [adversary judicial] proceedings clearly have begun when an accused is placed in custody, haled before a magistrate on a warrant or formal complaint, and then tentatively charged with a particular crime at this initial appearance or 'arraignment.'").

In *Jackson*, this Court again held that it was clear that adversary judicial proceedings had been initiated after the two defendants in that case were arrested and had made initial appearances before a judge. *See* 475 U.S. at 629 & n.3. Like *Brewer*, *Jackson* nowhere suggested that a prosecutor was aware of or involved with the arrests or initial appearances, or that such awareness carried any weight in the Court's determination that adversary judicial proceedings had commenced. While the Fifth Circuit opined that the "[Michigan] supreme court opinion preceding *Jackson* establishes that the prosecutor's office approved and issued the complaints and warrants that led to the arraignment," App. 7a-8a (citing *People* v. *Bladel*, 365 N.W.2d 56, 71-72 (Mich. 1984)), this Court never even mentioned—let alone relied on—this fact in reaching its holding that the defendants' Sixth Amendment rights attached at their initial appearances.[10]

To support its "prosecutorial involvement" test, the Fifth Circuit seized upon this Court's statement in *Kirby* that adversary judicial proceedings commence when "'the government has committed itself to prosecute'" and "'a defendant finds himself faced with the prosecutorial forces of organized society.'" App. 5a (quoting *Kirby*, 406 U.S. at 689). But, in light of this Court's subsequent holdings in *Brewer* and *Jackson*, it is clear that the Fifth Circuit misconstrued the import of that language.

This Court has never held that Sixth Amendment rights attach only upon the involvement of a prosecutor. Nor has it held that the "prosecutorial forces of organized society" are limited to prosecuting attorneys. *See United States* v. *Gouveia*, 467 U.S. 180, 189 (1984) (the Sixth Amendment right to

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[10] Indeed, the Michigan Supreme Court also did not rely in any way on any prosecutorial involvement in the issuance of the complaints or arrest warrants in *Jackson*, instead simply concluding that because the defendants in that case had been "arraigned" (*i.e.*, had made initial appearances before a magistrate, *see supra* n.1), their Sixth Amendment rights had attached. *See Bladel*, 365 N.W.2d at 62.

counsel applies when "the accused [is] confronted . . . by the procedural system, *or* by his expert adversary, or by both") (internal quotation marks and citation omitted) (emphasis added). And the Fifth Circuit offered no reason why the defendant's need "to rely on counsel as a 'medium' between him and the State," *Maine* v. *Moulton*, 474 U.S. 159, 176 (1985), should arise only when a *prosecutor* has filed charges against him. That need is equally present where—as here—a police officer has proffered a sworn accusation against a defendant "in the name and by the authority of the State," App. 33a, a judge has found probable cause to believe the defendant committed that offense, and the judge has bound him over to jail. By holding that adversary judicial proceedings had commenced in *Brewer* and *Jackson*, this Court has made clear that, when those events occur, a defendant is in fact "faced with the prosecutorial forces of organized society," and his Sixth Amendment right to counsel therefore has attached. *Jackson*, 475 U.S. at 631 (quoting *Gouveia*, 467 U.S. at 189 (quoting *Kirby*, 406 U.S. at 689)).[11]

The Fifth Circuit also sought to distinguish *Brewer* and *Jackson* by observing that the defendants in those cases were "arraigned on an arrest warrant," whereas Rothgery was arrested without a warrant. App. 7a. The court reasoned that Rothgery's initial appearance before the magistrate thus served only to determine probable cause for his arrest, rather than to mark the commencement of adversary judicial proceedings. App. 11a-12a. This Court's decisions, however, support no such distinction between arrests with

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[11] Indeed, *Jackson* made clear that "the confrontation between the State and the individual" that is the concern underlying the Sixth Amendment is not a confrontation with prosecutors alone, and that the police and the courts are also state actors for Sixth Amendment purposes. *See* 475 U.S. at 634 ("Sixth Amendment principles require that we impute the State's knowledge from one state actor to another. For the Sixth Amendment concerns the confrontation between the State and the individual. One set of state actors (the police) may not claim ignorance of defendants' unequivocal request for counsel to another state actor (the court).").

and without warrants. Indeed, one of the two defendants in *Jackson*—like Rothgery—was arrested *without* a warrant. *See Bladel*, 365 N.W.2d at 69 ("defendant [Jackson] was arrested for a felony without a warrant"). While the police obtained the prosecutor's approval for an arrest warrant just before Jackson's initial court appearance, that appearance served to validate his arrest, as well as to inform him of the charges against him and commit him to custody, *see id.* at 70-73—precisely what occurred at Rothgery's initial appearance.

In any event, the Fifth Circuit's proffered distinction makes little sense. In both *Brewer* and *Jackson*, the relevant facts were that the defendant had been arrested, a court had found probable cause to believe the defendant had committed an offense, and the court had bound the defendant over to jail. Those same events occurred here. It can make no constitutional difference whether the judicial determination of probable cause occurred *before* or *after* the defendant's arrest. In either case, once a court has made such a determination and the defendant has "been committed by the court to confinement," *Brewer*, 430 U.S. at 399, he has been transformed from a mere "suspect" to an "accused," *Jackson*, 475 U.S. at 632, and his Sixth Amendment rights have attached.[12]

Because the facts of this case are materially identical to those in *Brewer* and *Jackson*, the Fifth Circuit's holding that Rothgery had no right to counsel cannot be reconciled with this Court's precedent, and warrants this Court's review.

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[12] *See also, e.g., Mitzel*, 267 F.3d at 532 (Sixth Amendment right attached following a warrantless arrest, an initial appearance before a magistrate, and confinement to jail); *Bradford*, 927 S.W.2d at 333-334 (Sixth Amendment right was triggered by an initial appearance before a magistrate who simultaneously found probable cause for the defendant's detention by the police and committed her to custody).

III. THE FIFTH CIRCUIT'S "PROSECUTORIAL INVOLVEMENT" TEST WILL BE UNWORKABLE IN PRACTICE AND WILL PERMIT INDIGENT DEFENDANTS TO BE JAILED FOR LONG PERIODS WITHOUT COUNSEL

Finally, the Fifth Circuit's decision merits review because of its undesirable, and potentially far-reaching, practical consequences.

As an initial matter, the Fifth Circuit's "prosecutorial involvement" test requires courts to engage in an unnecessarily fact-intensive, and ultimately unworkable, inquiry. While *Kirby*, *Brewer*, and *Jackson* establish a straightforward, easily applicable test for determining when the Sixth Amendment right to counsel attaches based on the nature of the *proceedings* that took place, the Fifth Circuit's approach requires courts to look beyond the objectively ascertainable procedural posture of a case to delve into precisely what prosecutors knew about the police's actions, when they knew it, and the extent of their involvement in pre-trial proceedings. Such an inquiry is likely to be both unnecessarily complicated and unduly intrusive.

For example, a defendant may file a motion to suppress statements made after what the defendant asserts is the commencement of adversary judicial proceedings. If communication between law enforcement officers and prosecutors is not memorialized in formal documents filed with the court, the court must receive testimony to determine who knew what when. A prosecutor's notes and testimony could become regular features of suppression hearings, and discovery battles could ensue. The courts will need to examine details such as whether a prosecutor helped a police officer with a complaint, or whether an officer left a message informing a prosecutor that an arrest warrant had been obtained or that an initial appearance had been scheduled. There is no justification for engrafting such a needlessly

complex inquiry onto what should be the straightforward determination of when a defendant is entitled to counsel.[13]

Moreover, and more fundamentally, under the Fifth Circuit's test, indigent defendants can be incarcerated for lengthy periods without counsel. A prosecutor may take six months (as in this case) or more before indicting a felony defendant. Under the Fifth Circuit's rule, an indigent defendant arrested without a prosecutor's involvement could be jailed throughout that period without access to any legal assistance.

The facts of this case make plain the threat that the Fifth Circuit's rule poses to the values underlying the Sixth Amendment. Here, had an attorney been appointed after Rothgery's initial appearance, when he requested counsel, the mistake underlying his arrest would have quickly been uncovered and the charges dismissed—as they eventually were more than six months later. Had Rothgery had the assistance of counsel during that time, his bail would not have been increased, he would not have been rearrested, and he would not have been wrongfully jailed.

As this Court has declared: The "noble ideal [where every individual stands equal before the law] cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him." *Gideon*, 372 U.S. at 344. Because the Fifth Circuit's approach leaves indigent defendants in that circuit without the assistance of counsel to contest substantial court-imposed deprivations of their liberty, the Court should review this case.

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[13] Moreover, it is unclear what degree of knowledge or involvement by prosecutors is required under the Fifth Circuit's test. The decision will lead to litigation over questions such as whether it is sufficient that a police officer informed a prosecutor that an individual had been arrested or whether a prosecutor must be involved in the pre-trial proceedings in some manner, and if so, the requisite extent and formality of such involvement.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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SEPTEMBER 2007

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 06-50267

WALTER ALLEN ROTHGERY, PLAINTIFF-APPELLANT,

v.

GILLESPIE COUNTY, TEXAS, DEFENDANT-APPELLEE.

June 29, 2007

Appeal from the United States District Court
for the Western District of Texas, Austin

[491 F.3d 293]

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[294]

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Before KING, WIENER, and OWEN, Circuit Judges.

KING, Circuit Judge:

In *McGee v. Estelle*, we held that a warrantless arrestee's Sixth and Fourteenth Amendment right to counsel does not attach in Texas when he appears before a magistrate for statutory warnings if prosecutors are unaware of and uninvolved in the arrest and appearance. 625 F.2d 1206, 1208-09 (5th Cir. 1980). The district court in this case reached a similar conclusion where the warrantless arrestee's appearance involved not only statutory warnings,

but also a probable cause determination by the magistrate that was supported by a police officer's affidavit accusing the arrestee of committing the relevant offense. Because we agree that the appearance in this case did not commence adversary judicial proceedings for purposes of the Sixth and Fourteenth Amendment right to counsel, we AFFIRM the district court's order granting summary judgment for Gillespie County.

I. FACTUAL AND PROCEDURAL BACKGROUND

On July 15, 2002, officers of the Fredericksburg, Texas Police Department arrested plaintiff-appellant Walter Rothgery without a warrant on suspicion of being a felon in possession of a firearm, which is a third-degree felony in Texas. The suspicion was based on a criminal background check indicating that Rothgery had been convicted of a felony in California. In fact, felony charges against Rothgery in California had been dismissed after Rothgery completed a diversionary program, and both sides agree that Rothgery did not have a felony conviction.

Under the misimpression that Rothgery had a prior felony conviction, the officers booked Rothgery into the Gillespie County Jail. Rothgery says that he requested in writing the appointment of counsel at this point, though there is no record of the request. The next morning, on July 16, Rothgery was brought before a Justice of the Peace (the "magistrate") to be informed of the accusation against him and [295] to be given statutory warnings under Article 15.17 of the Texas Code of Criminal Procedure, which provides for warnings generally equivalent to those required by *Miranda v. Arizona*, 384 U.S. 436 (1966).[1] Rothgery signed a docu-

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[1] Article 14.06 of the Texas Code of Criminal Procedure requires that a person arrested without a warrant be taken before a magistrate within 48 hours of arrest, at which point the magistrate must "immediately perform the duties described in Article 15.17." TEX. CODE CRIM. PROC. ANN. art. 14.06. Article 15.17, which also applies to those who are arrested under warrant, requires that the magistrate inform the arrestee of the accusation against him, of any affidavit filed against him, and of his rights to retain counsel, to have counsel appointed for him if he cannot

ment reflecting that the magistrate did so and that Rothgery stood "accused of the criminal offense of[] unlawful possession of a firearm by a felon which will be filed in 21st District Court." On the document, the magistrate swore that "[t]he accused has announced the intention to waive right to counsel at this time."[2] The magistrate set bond at $5,000.

The arresting officer also presented the court with an affidavit titled "Affidavit of Probable Cause." The form document was filled in with the officer's description of the events leading up to the arrest and recited, "I charge that heretofore, on or about the 15[th] day of July, 2002, in the County of Gillespie and the State of Texas, Defendant, Walter A. Rothgery, did then and there commit the offense of unlawful possession of a firearm by a felon—3rd degree felony." Based on the affidavit, the magistrate found that probable cause existed for Rothgery's arrest, signing the document under a portion of text stating, "I hereby acknowledge I have examined the foregoing affidavit and have determined that probable cause existed for the arrest of the individual accused therein." After the appearance, Rothgery posted a surety bond to obtain release from jail. The bond agreement between Rothgery and the bonding company states, among other details of Rothgery's arrest, that "Rothgery stands charged by complaint duly filed in the Justice of Peace Court."

Rothgery says that he repeatedly requested counsel in the months following his release, but no counsel was ap-

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afford counsel, to remain silent, to have an attorney present during interviews with officers of the state, to terminate interviews at any time, and to have an examining trial to probe the existence of probable cause. *Id.* art. 15.17. The magistrate may also "admit the person arrested to bail if allowed by law." *Id.*

[2] According to Rothgery, the magistrate told him that he would have to waive his right to an attorney for purposes of the appearance if he wanted to have bail set at that time, and that otherwise he would have to wait in jail until an appointment was made. On the original typed document, only the words "waive right to counsel" were underlined, and Rothgery says that the words "at this time" were also underlined by hand to reflect this limited waiver.

pointed. On January 17, 2003, six months after his arrest, a grand jury returned an indictment against Rothgery and he was rearrested the next day. Rothgery was brought before the magistrate again on January 19 and he again requested counsel, but no attorney was appointed. On January 23, still with no attorney, Rothgery was transferred to another jail due to overcrowding at the Gillespie County Jail. Finally, after Rothgery requested counsel yet again, a state district judge appointed counsel on January 23, 2003. Once appointed, Rothgery's counsel soon obtained records establishing that Rothgery had not been convicted of a felony. He moved to dismiss the charges, and the motion was granted on April 30, 2003.

On July 15, 2004, Rothgery sued defendant-appellee Gillespie County under [296] 42 U.S.C. § 1983, alleging that the county violated his Sixth and Fourteenth Amendment right to counsel by following a policy of denying appointed counsel to arrestees released from jail on bond and by failing to adequately train and monitor those involved in the appointment-of-counsel process. Rothgery's contention is that counsel should have been appointed for him after his first appearance in the magistrate's court on July 16, 2002, and that the mistake underlying his arrest would have been discovered had counsel been timely appointed. Gillespie County moved for summary judgment on the ground that Rothgery's Sixth and Fourteenth Amendment right to counsel did not attach until his indictment on January 17, 2003, which marked the initiation of adversary judicial proceedings against him. The district court granted the motion on February 2, 2006, and issued a take-nothing final judgment. Rothgery appeals.[3]

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[3] We are indebted to the Solicitor General of Texas, Ted Cruz, who filed an amicus curiae brief in this appeal at our request, and to Professor George Dix of The University of Texas School of Law, who also filed an amicus curiae brief.

II. STANDARD OF REVIEW

We review a grant of summary judgment de novo, viewing all evidence in the light most favorable to the nonmoving party and drawing all reasonable inferences in that party's favor. *See Crawford v. Formosa Plastics Corp.*, 234 F.3d 899, 902 (5th Cir. 2000). "Summary judgment is proper when the evidence reflects no genuine issues of material fact and the non-movant is entitled to judgment as a matter of law." *Id.* (citing FED. R. CIV. P. 56(c)). "A genuine issue of material fact exists 'if the evidence is such that a reasonable jury could return a verdict for the non-moving party.'" *Id.* (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

III. DISCUSSION

The Sixth Amendment, which is applicable to the states through the Fourteenth Amendment,[4] provides in relevant part that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI. This right "attaches only at or after the time that adversary judicial proceedings have been initiated . . . whether by way of formal charge, preliminary hearing, indictment, information, or arraignment."[5] *Kirby v. Illinois*, 406 U.S. 682, 688-89 (1972) (citations and footnote omitted). But we do not rely formalistically on the label given to a particular pretrial event when determining the point at which adversary judicial proceedings have been initiated; instead, "the relevant time is when 'the government has committed itself to prosecute' and 'a defendant finds himself faced with the prosecutorial forces of organized

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[4] *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963). For clarity, we will refer only to the Sixth Amendment when discussing the right to counsel.

[5] After the Sixth Amendment right to counsel attaches, a defendant is entitled to counsel at "critical stages" of the proceedings, absent a valid waiver. *See Michigan v. Jackson*, 475 U.S. 625, 629-30 & n. 3, 632 n.5 (1986).

Gillespie County does not argue that the time between Rothgery's release on bond and his indictment six months later did not constitute a critical stage of the prosecution, and we do not decide that issue here.

society.""[6] [297] *Caver v. Alabama*, 577 F.2d 1188, 1195 (5th Cir. 1978) (quoting *Kirby*, 406 U.S. at 689); *see also Lomax v. Alabama*, 629 F.2d 413, 415 & n.3 (5th Cir. 1980) (rejecting the use of "purely formal application of quantitative criteria" to determine when adversary judicial proceedings commenced).

Following this approach in *Lomax v. Alabama*, we instructed that "reliance should be placed on the sometimes elusive degree to which the prosecutorial forces of the state have focused on an individual." 629 F.2d at 415. Accordingly, we held that an arrest, under a warrant secured with a magistrate's probable cause determination, did not commence adversary judicial proceedings because the record did not reflect any prosecutorial awareness of or involvement in the arrest, nor any participation by prosecutors in preparing the "complaint affidavits used to secure" the warrant. *Id.* at 415-16. Similarly, we held in *McGee v. Estelle* that in Texas, "an adversary criminal proceeding has not begun in a case where the prosecution officers are unaware of either the charges or the arrest." 625 F.2d 1206, 1208 (5th Cir. 1980). We thus concluded that a warrantless arrestee's lineup and appearance before a magistrate for Article 15.17 warnings did not initiate adversary judicial proceedings, as prosecutors were unaware of and uninvolved in either event.[7] *Id.* at 1208-09.

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[6] "We look to state law to determine when adversarial proceedings against the accused have commenced," *Felder v. McCotter*, 765 F.2d 1245, 1247 (5th Cir. 1985), *abrogated on other grounds by Patterson v. Illinois*, 487 U.S. 285, 295-96 & n.8 (1988), although the ultimate Sixth Amendment consequences of certain state procedures is a matter of federal law.

[7] While the opinion did observe at one point that an Article 15.17 warnings appearance before a magistrate "does not involve counsel for the state, nor is it a formal charge," *McGee*, 625 F.2d at 1209 (emphasis added), we do not read that to imply that formal charges may exist in Texas without any prosecutorial knowledge or involvement. In context, the statement merely clarified that prosecutors do not participate in such an appearance, nor are formal charges filed. We have not held that prosecutors must actually file the document that initiates adversary judicial proceedings, *see, e.g.*, *Felder*, 765 F.2d at 1246, 1247-48 (noting that a police officer's filing of an affidavit and criminal complaint commenced ad-

It is undisputed in this appeal that the relevant prosecutors were not aware of or involved in Rothgery's arrest or appearance before the magistrate on July 16, 2002. There is also no indication that the officer who filed the probable cause affidavit at Rothgery's appearance had any power to commit the state to prosecute without the knowledge or involvement of a prosecutor. *Compare* TEX. CODE CRIM. PROC. ANN. art. 2.13 (limiting the role of a police officer, in relevant part, to notifying the magistrate of an offense and arresting offenders), *with id.* art. 2.01-.02 (designating district and county attorneys as the representatives of the state in all criminal cases and proceedings); *cf. Clawson v. Wharton County*, 941 S.W.2d 267, 272 (Tex. App.-Corpus Christi 1996, writ denied) (recognizing that "the decision not to prosecute is the quintessential function of a prosecutor" (dash omitted)). And Rothgery provides no reason why the officer's acts should somehow be imputed to the prosecutor's office or should otherwise be interpreted to signal that Rothgery was opposed by the prosecutorial forces of the state. Consequently, the summary judgment evidence fails to establish that adversary judicial proceedings had been initiated against Rothgery during his magistrate appearance.

Rothgery raises several arguments against this conclusion. First, he contends that *McGee*'s holding on prosecutorial involvement [298] is not good law, as the Supreme Court has twice found adversary judicial proceedings to have been initiated without mentioning whether prosecutors were involved. *See Michigan v. Jackson*, 475 U.S. 625, 629 n.3 (1986); *Brewer v. Williams*, 430 U.S. 387, 399 (1977). However, neither case addressed the issue of prosecutorial involvement, much less the relevance of prosecutorial involvement under Texas law. Further, both cases involved a defendant who was arraigned on an arrest warrant, and an arraignment is one of the specific examples given in *Kirby* of

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versary judicial proceedings), but merely that adversary judicial proceedings cannot initiate without some prosecutorial awareness or involvement, *McGee*, 625 F.2d at 1208; *see also Lomax*, 629 F.2d at 415.

pretrial events that initiate adversary judicial proceedings. Although Rothgery argues that the arraignment in *Jackson* was functionally no different than his appearance here, the state supreme court opinion preceding *Jackson* establishes that the prosecutor's office approved and issued the complaints and warrants that led to the arraignment. *See People v. Bladel*, 365 N.W.2d 56, 71-72 (Mich. 1984). And while the extent of prosecutorial involvement in *Brewer* was unaddressed, it does not appear that the state contested that adversary judicial proceedings had begun or otherwise raised the issue. *See Brewer*, 430 U.S. at 399 ("The State does not contend otherwise."). At most, the opinions are neutral on the point, which is simply not enough for us to ignore our binding authority.[8]

Rothgery also argues that *McGee* is inapplicable here, as the appearance before the magistrate in *McGee* only involved the recitation of statutory warnings, whereas Rothgery's appearance included statutory warnings and a probable cause determination that was based on a police officer's affidavit. Rothgery contends that the affidavit, which related the events underlying the arrest and stated that the officer "charge[d]" that Rothgery committed the offense of being a felon in possession of a firearm, constituted a "complaint" or an otherwise formal charge that initiated adversarial proceedings.[9]

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[8] According to Rothgery, *United States v. Gouveia* also affirmed that prosecutorial involvement is unnecessary because it used the word "or" when observing that it had "extended an accused's right to counsel to certain 'critical' pretrial proceedings . . . recognizing that at those proceedings, 'the accused [is] confronted, just as at trial, by the procedural system, or by his expert adversary, or by both.'" 467 U.S. 180, 189 (1984) (citing *United States v. Wade*, 388 U.S. 218 (1967), and quoting *United States v. Ash*, 413 U.S. 300, 310 (1973)) (citations omitted). But in that passage the Court was discussing the applicability of the right to counsel at critical stages of the prosecution, not the specific question of when adversary judicial proceedings are initiated.

[9] Additionally, Rothgery asserts that his appearance before the magistrate commenced the prosecution because a magistrate has exclusive jurisdiction over a defendant's case upon the filing of a felony complaint until superseded by indictment. *See Ex parte Clear*, 573 S.W.2d 224, 229

While only an indictment or information can formally charge a felony under Texas law,[10] *see Teal v. State*, No. PD-0689-06, 2007 WL 676221, at *2 (Tex. Crim. App. Mar. 7, 2007); *see also* [299] TEX. CONST. art. I, § 10; TEX. CODE CRIM. PROC. ANN. arts. 21.01, 21.20; GEORGE E. DIX & ROBERT O. DAWSON, 41 TEXAS PRACTICE: CRIMINAL PRACTICE AND PROCEDURE § 20.01, at 513 (2d ed. 2001), complaints play a role in felony cases as well. Defined as "[t]he affidavit made before the magistrate or district or county attorney . . . charg[ing] the commission of an offense," TEX. CODE CRIM. PROC. ANN. art. 15.04, a complaint under Article 15.04 of the Texas Code of Criminal Procedure may serve both as a basis for a probable cause finding for an arrest warrant, *see Huynh v. State*, 901 S.W.2d 480, 481 n.3 (Tex. Crim. App. 1995); *Lowery v. State*, 499 S.W.2d 160, 163 (Tex. Crim. App. 1973), and "as a basis for the issuance of an information or the commencement of the indictment process," *State v. Boseman*, 830 S.W.2d 588, 590 n.3 (Tex. Crim. App. 1992); *see also* DIX & DAWSON, 41 TEXAS PRACTICE: CRIMINAL PRACTICE AND PROCEDURE § 19.01, at 473 ("As a matter of local practice, . . . complaints may be routinely filed in felony prosecutions and may reflect prosecutors' decisions to pursue formal felony charges in the particular cases."). Because "the process of prosecution is usually initiated by the filing of a criminal 'complaint'" serving that latter function, *Boseman*, 830 S.W.2d at 590 n.3, our court and the Texas Court of Criminal Appeals[11] have construed felony

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(Tex. Crim. App. 1978). Even assuming that the affidavit in this case served the same function as the complaint in *Clear*, we fail to see how a magistrate's jurisdiction over preliminary matters alone signals the initiation of adversary proceedings when prosecutors are unaware of and uninvolved in the proceedings. Indeed, *Clear* itself involved a complaint that was sworn before a prosecutor and filed by the prosecutor with the magistrate. *Id.* at 225-26.

[10] Complaints may serve to formally charge a misdemeanor offense in justice and municipal courts. Huynh v. State, 901 S.W.2d 480, 481 n. 3 (Tex. Crim. App. 1995).

[11] While state case law is not binding on our court with regard to the applicability of the Sixth Amendment to state procedures, state cases are nonetheless useful for determining the nature of certain state procedures.

complaints to be sufficient to initiate adversary judicial proceedings.[12] *See, e.g., Felder v. McCotter*, 765 F.2d 1245, 1247-48 (5th Cir. 1985), *abrogated on other grounds by Patterson v. Illinois*, 487 U.S. 285, 295-96 & n.8 (1988); *Forte v. State*, 707 S.W.2d 89, 92 (Tex. Crim. App. 1986); *Barnhill v. State*, 657 S.W.2d 131, 132 (Tex. Crim. App. 1983).

However, none of those cases details the circumstances involved in the filing of the dispositive complaint or addresses an affidavit that was filed after a warrantless arrest to support a magistrate's probable cause inquiry at an Article 15.17 warnings appearance. In fact, in similar circumstances involving a warrantless arrest, a felony complaint, and a magistrate's probable cause determination at an Article 15.17 warnings appearance, the Texas Court of Criminal Appeals chose not to decide whether the complaint initiated adversary judicial proceedings, which indicates that the relationship between a complaint and the commencement of a prosecution in Texas is less clear than Rothgery claims.[13] [300] *See Green v. State*, 872 S.W.2d 717, 720 (Tex. Crim. App. 1994). As complaints may be used for different purposes, we simply cannot assume that the affidavit filed in

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[12] Despite Rothgery's claim that *Nehman v. State*, 721 S.W.2d 319, 322 (Tex. Crim. App. 1986) (en banc), holds that the combination of a probable cause determination and an Article 15.17 warnings appearance initiates adversary judicial proceedings, the Texas Court of Criminal Appeals later observed that Nehman's holding was based on the presence of "unspecified 'charges.'" *Green v. State*, 872 S.W.2d 717, 720 (Tex. Crim. App. 1994); *Nehman*, 721 S.W.2d at 323 n.2. At the very least, we must assume that Nehman involved a felony complaint.

[13] *Green v. State* involved a Sixth Amendment claim in the context of an arrest without a warrant, the filing of a "felony complaint" with a notation indicating the setting of bail, and an appearance before a magistrate for Article 15.17 warnings and a probable cause determination. 872 S.W.2d at 718. After discussing the indeterminacy of Texas law on the question of which procedures serve to initiate adversary judicial proceedings and noting the cases that have held that the filing of a complaint serves that function, the court stated: "We need not here decide when adversary judicial proceedings commence. For even if the felony complaint was sufficient to mark the initiation of adversary judicial proceedings, . . . nothing occurred at appellant's [hearing] that would render it a 'critical stage' of the prosecution against him." *Id.* at 720.

this case was the same type of complaint addressed in the cases cited by Rothgery or that it served the same function as those complaints.

Consequently, we are reluctant to rely on the formalistic question of whether the affidavit here would be considered a "complaint" or its functional equivalent under Texas case law and Article 15.04 of the Texas Code of Criminal Procedures—a question to which the answer is itself uncertain.[14] Instead, we must look to the specific circumstances of this case and the nature of the affidavit filed at Rothgery's appearance before the magistrate. And the summary judgment evidence, considered in the light most favorable to Rothgery, fails to establish that adversary judicial proceedings were commenced by the affidavit in this case.

The affidavit itself indicates that it was filed for the sole purpose of establishing probable cause, as it was titled "Affidavit of Probable Cause," it primarily consisted of the officer's account of the events and the alleged offense, and the portion of the affidavit signed by the magistrate illustrates that the magistrate relied on the officer's account to "determine[] that probable cause existed for the arrest." The inquiry and its timing shortly after arrest were thus consistent with the probable cause determination required by *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975),[15] and *County of Riv-*

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[14] As Gillespie County points out, Article 15.04 falls within the "Arrest Under Warrant" chapter of the Texas Code of Criminal Procedure, indicating that it may only apply to affidavits offered in support of an arrest warrant. Additionally, the provision refers to "[*t*]*he* affidavit" made before the magistrate or prosecutor, TEX. CODE CRIM. PROC. ANN. art. 15.04 (emphasis added), and its use of the definite article "the" indicates that its scope may be limited to affidavits detailed elsewhere in the code. The code does not explicitly provide for an affidavit offered at a probable cause hearing for a warrantless arrestee.

In practice, however, we cannot say that Texas courts would not consider a post-warrantless-arrest affidavit of probable cause to be an Article 15.04 complaint or its functional equivalent.

[15] The Court in *Gerstein* also recognized that such probable cause determinations typically are non-adversarial in nature and do not constitute "critical stages" requiring counsel. 420 U.S. at 120-22.

erside v. McLaughlin, 500 U.S. 44, 56 (1991), for a person arrested without a warrant. And another form signed by the magistrate to memorialize the warnings given to Rothgery indicated that charges "will be filed" in the district court, not that they were being filed concurrently with the magistrate.

The only aspect of the probable cause affidavit that even arguably favors Rothgery's argument is its use of the word "charge" in the introductory language to the officer's identification of the offense for which he arrested Rothgery. Yet even as a complaint, the affidavit would be insufficient to formally charge Rothgery with the felony, and there is no basis to conclude that the use of the word "charge" was, or could have been, anything but informal.[16] *Cf. McGee*, 625 F.2d at 1208 (referring to the prosecutor's lack of awareness of "the charges" in finding that adversary judicial proceedings had not initiated).

Most significantly, the summary judgment evidence reflects no prosecutorial knowledge of or involvement in the arrest [301] and magistrate appearance, and Rothgery provides no reason to believe that the officer alone was empowered to commit the state to prosecute Rothgery. Indeed, it took prosecutors roughly six months after the arrest to seek an indictment against Rothgery. Without any evidence to indicate that the affidavit actually served to initiate the prosecution at the time of Rothgery's magistrate appearance, we conclude that the filing of the affidavit was part of the investigatory process, serving solely to validate the arrest without committing the state to prosecute.

IV. CONCLUSION

For the foregoing reasons, we AFFIRM the district court's order granting summary judgment to Gillespie County.

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[16] For similar reasons, we also do not find the use of the word "charged" on Rothgery's bond form persuasive.

APPENDIX B

UNITED STATES DISTRICT COURT
W.D. TEXAS, AUSTIN DIVISION

No. A-04-CA-456LY

WALTER ALLEN ROTHGERY, PLAINTIFF,

v.

GILLESPIE COUNTY, TEXAS, DEFENDANT.

Feb. 2, 2006

[413 F. Supp. 2d 806]

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[807]

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MEMORANDUM OPINION AND ORDER ON MOTION FOR SUMMARY JUDGMENT

YEAKEL, District Judge.

Before the Court are Defendant Gillespie County's Motion for Summary Judgment filed July 18, 2005 (Doc. # 28); Plaintiff's Response in Opposition to Defendant's Motion for Summary Judgment filed August 8, 2005 (Doc. # 32); Plaintiff's Appendix of Summary Judgement Evidence filed August 8, 2005 (Doc. # 33); and Defendant Gillespie County's Reply to Plaintiff's Response to Defendant's Motion for Summary Judgment filed August 19, 2005 (Doc. # 29). The Court heard argument on the motion on November 18, 2005.

Having considered the motion, response, and reply, as well as argument of counsel, summary-judgment proof presented, and applicable case law, the Court will grant the summary-judgment motion for the following reasons.

I. Background

On July 15, 2002, officers of the Fredericksburg, Texas Police Department arrested Plaintiff Walter Allen Rothgery without a warrant for unlawfully carrying a firearm by a felon, a third-degree felony under Texas law.[1] Rothgery was taken to the Gillespie County jail for booking. Rothgery states he requested, in writing, appointment of counsel, because he could not afford to hire an attorney to defend him. This written request is not a part of the summary-judgment proof submitted to this Court.

The next morning, July 16, 2002, Rothgery appeared before Judge Carl Schoessow, Justice of the Peace, Precinct # 2, Gillespie County.[2] At that time, Judge Schoessow pre-

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[1] At the summary-judgment stage, this Court is required to believe the evidence of the nonmovant and to draw all justifiable inferences in the nonmovant's favor. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The Court's factual recitation, therefore, reflects Rothgery's version of the facts.

[2] Because Rothgery was arrested without a warrant, Texas law requires that he be presented to a magistrate within forty-eight hours of his arrest. *See* TEX CODE CRIM. PROC. ANN. art. 14.06(a) (West Supp.2005). Presentation to the magistrate is required, in part, so that the magistrate can inform a person arrested of the accusation against him and of any affidavit filed therewith, of his right to retain counsel, of his right to remain silent, of his right to have an attorney present during any interview with peace officers or attorneys representing the state, of his right to terminate the interview at any time, of his right to have an examining trial, and of his right to request the appointment of counsel if the person cannot afford counsel. *See* TEX CODE CRIM. PROC. ANN. art. 15.17(a) (West Supp.2005). The magistrate is further required to inform the person arrested of the procedures for requesting appointment of counsel and that he is not required to make a statement and that any statement made by him may be used against him. *See id.* These sections of the Texas Code of Criminal Procedure were amended after Rothgery's arrest. Because the amendments did not materially alter the sections as they existed then, the current versions are cited for simplicity.

sented Rothgery with a form "Warning by Magistrate (Setting [808] Bail & Right to Attorney) State of Texas, County of Gillespie," which Rothgery submitted as part of his summary-judgment proof. The form reflects that Judge Schoessow informed Rothgery that Rothgery was accused of the criminal offense of unlawful possession of a firearm by a felon, but that formal charges had not yet been filed against Rothgery, and that Judge Schoessow set Rothgery's bond at $5,000. Additionally, the form reflects that Judge Schoessow informed Rothgery of his right to appointed counsel, if Rothgery could not afford counsel, and that Rothgery waived his right to counsel "at that time."[3]

As part of his summary-judgment proof, Rothgery also submitted the Affidavit of Probable Cause sworn to by the arresting officer on July 15, 2002. This affidavit purports to set forth facts personally observed by the arresting officer regarding Rothgery's actions on July 15, 2002, and charges that Rothgery committed the offense of unlawful possession of a firearm by a felon, a third degree felony. *See* TEX. PENAL CODE ANN. § 46.04 (West Supp. 2005).[4] The affidavit further reflects that on July 16, 2002, Judge Schoessow examined the affidavit and determined that probable cause existed for the arrest of Rothgery.

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[3] The phrase "at that time" is underlined on the form. Rothgery testified in his deposition that this phrase was underlined because, when Rothgery asked Judge Schoessow about the status of his July 15, 2002 request for appointment of counsel. Judge Schoessow said that Rothgery would have to waive his right to an attorney for purposes of the July 16, 2002 appearance, if Rothgery wanted to have bail set at that time. According to Rothgery, Judge Schoessow told him that he would have to wait in jail until an appointment was made, if Rothgery wanted an attorney appointed for the bail determination. Rothgery further testified that he agreed to waive his right to counsel for purposes of that proceeding only based upon Judge Schoessow's statements, and that Judge Schoessow underlined the phrase "at that time" to reflect this limited waiver.

[4] This section of the Texas Penal Code was amended after Rothgery's arrest. Because the amendment did not materially alter the section as it existed then, the current version is cited for simplicity.

After Rothgery posted bail, he continued to inquire about the status of his July 15, 2002 request for appointment of counsel. After county employees informed him that they could not locate his July 15, 2002 request for counsel, Rothgery completed a second written request for appointment of counsel on July 24, 2002. Rothgery caused the request to be notarized and submitted to jail employees. No attorney was appointed for him based on the July 24, 2002 request.

As is true of the July 15, 2002 request, this second request is not a part of the summary-judgment proof before this Court. Rothgery's summary-judgment [809] proof does include the notary log of Barbara Crenwegle, the administrative assistant to the Gillespie County Judge and Commissioners. Crenwegle's notary log reflects that Crenwegle notarized a request for appointment of an attorney and an affidavit in support of an application for appointment of an attorney on July 24, 2002, for "Walter A. Rothgery."

From July 2002 until January 2003, Rothgery claims that he repeatedly contacted employees of Gillespie County to inquire about the status of his appointment of counsel. Rothgery testified in his deposition that he was consistently told that no appointment had been made.

On January 17, 2003, six months after Rothgery's arrest, a Gillespie County grand jury returned an indictment against Rothgery for the state felony offense of unlawfully carrying a firearm by a felon. Rothgery's bond was increased to $15,000, and he was rearrested on January 18, 2003. Rothgery was again brought before Judge Schoessow on January 19, 2003.[5] When he appeared before Judge Schoessow, Rothgery inquired about the status of his last request for appointment of counsel, the July 24, 2002 written

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[5] Rothgery testified in his deposition that he thought he appeared before Judge Schoessow on January 19, 2003, but that he was unsure. As part of its summary-judgment proof, Gillespie County submitted the second "Warning by Magistrate (Setting Bail & Right to Attorney) State of Texas, County of Gillespie" form issued to Rothgery, and this form reflects that Rothgery appeared before Judge Schoessow on January 19, 2003.

request. Rothgery states that Judge Schoessow speculated that Rothgery had not been appointed an attorney because he "didn't deserve one." Rothgery further testified in his deposition that, as of January 19, 2003, there was no record of his submitting the previous two requests for appointment of counsel. Rothgery claims that he submitted a third form requesting counsel on January 19, 2003. Like the others, this request is not in the summary-judgment record before this Court.

Three days later, and still with no appointed attorney, Rothgery was transferred to the Comanche County jail due to overcrowding in the Gillespie County jail. Rothgery asked Comanche County jail employees about the status of his request for appointment of counsel, and was told that they knew nothing of such request. On January 23, 2003, Rothgery completed a fourth written request, and employees at the Comanche County jail faxed the request to Gillespie County. Based on this request, State District Judge Stephen Ables immediately appointed counsel to represent Rothgery. The January 23, 2003 request is part of the summary-judgment record in this case.

Rothgery's appointed counsel expeditiously obtained records concerning the alleged underlying offense, which reflected that Rothgery was not a convicted felon. On that basis, the Gillespie County District Attorney moved to dismiss the indictment. Judge Ables granted the motion and dismissed the indictment against Rothgery on April 30, 2003.

On July 15, 2004, Rothgery filed this action under Title 42, United States Code, Section 1983, the federal Civil Rights Act, against Gillespie County. *See* 42 U.S.C. § 1983. Rothgery alleges that Gillespie County's policies or customs regarding appointment of counsel for indigent defendants violate the Sixth and Fourteenth Amendments to the United States Constitution. Rothgery does not, however, complain about Gillespie County's written policies and procedures concerning appointment of counsel for indigent defendants. Rather, Rothgery complains about unwritten policies and cus- [810] toms concerning appointment of counsel for indi-

gent defendants that he alleges both the county and state courts follow in Gillespie County.[6]

Specifically, Rothgery alleges that Gillespie County follows a policy, practice, and custom that denies access to appointed counsel to a person charged with a felony, if that person is released from jail on bond, regardless of the person's financial status. Alternatively, Rothgery alleges that Gillespie County follows a policy, practice, and custom that denies access to appointed counsel to a person charged with a felony, but not yet indicted, if that person is out of custody on bond at the time of his request for counsel, regardless of the person's financial status. Rothgery further alleges that Gillespie County follows a policy, practice, and custom that involves failure to adequately train, supervise, and monitor county employees to whom the responsibility for preliminary processing of requests for appointed counsel has been delegated; thus creating an unreasonable risk that applications for appointed counsel will not be recorded and will not be ruled upon in a timely manner. Lastly, Rothgery alleges that Gillespie County follows a policy, practice, and custom that involves failure to adequately monitor appointed counsel, creating an unreasonable risk that attorneys appointed to represent indigent criminal defendants will not promptly contact those defendants, thereby denying meaningful access to counsel. Seeking monetary damages against Gillespie County, Rothgery claims these policies and customs injured him because, had he been timely appointed counsel in July 2002, the charges against him would have been resolved before he was indicted, rearrested, incarcerated, and subjected to increased bail in January 2003.

Gillespie County moves for summary judgment on Rothgery's entire action, arguing that there is no constitu-

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[6] As part of his summary-judgment proof, Rothgery submitted Gillespie County's written policies, "Gillespie County Plan and Standing Rules and Order for Procedures for Timely and Fair Appointment of Counsel for Indigent Accused Persons in Gillespie County, Texas." Since these written policies are not at issue in this action, this Court expresses no opinion of them.

tional duty to appoint counsel prior to the initiation of adversary judicial proceedings. Gillespie County contends that the July 16, 2002 appearance before Judge Schoessow was not an adversary judicial proceeding because an appearance before a magistrate for statutory warnings does not involve counsel for the state and does not constitute a formal charge. Gillespie County argues that adversary judicial proceedings, sufficient to trigger Rothgery's Sixth Amendment right to counsel, were not initiated until after Rothgery was indicted and he made his first post-indictment court appearance. Thus, Gillespie County argues that the failure to appoint counsel for Rothgery from July 16, 2002, through January 23, 2003, did not violate Rothgery's Sixth Amendment right to counsel.

To the contrary, Rothgery argues that adversary proceedings were initiated against him on July 16, 2002, when he was charged by criminal complaint under Texas law. Rothgery contends that formal charges were filed against him under Texas law on July 16, 2002, when the arresting officer presented Judge Schoessow with the probable-cause affidavit. Gillespie County replies that no adversary judicial proceedings had begun on July 16, 2002, because the probable-cause affidavit is not a felony complaint under Texas law, and, even if it were, a felony complaint may be insufficient to trigger to the Sixth Amendment right to appointed counsel.

[811] As discussed fully below, this Court concludes that neither the presentation of the probable-cause affidavit to Judge Schoessow nor Rothgery's appearance before Judge Schoessow on July 16, 2002, initiated adversary judicial proceedings against Rothgery. Thus, Rothgery's Sixth Amendment right to counsel did not attach on July 16, 2002, and Gillespie County did not violate Rothgery's Sixth and Fourteenth Amendment rights by failing to appoint counsel from July 16, 2002, through January 23, 2003.[7]

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[7] Gillespie County also moves for summary judgment on the grounds that it has no duty to appoint counsel or to establish plans or procedures for appointing counsel. Because the resolution of the Sixth Amendment

II. Summary-Judgment Standard

Summary judgment should be granted if the record, taken as a whole, "together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c); *New York Life Ins. Co. v. Travelers Ins. Co.*, 92 F.3d 336, 338 (5th Cir. 1996). The Supreme Court has interpreted the plain language of Rule 56(c) to mandate "the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). A party moving for summary judgment "must 'demonstrate the absence of a genuine issue of material fact,' but need not negate the elements of the nonmovant's case." *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (*en banc*) (quoting *Celotex*, 477 U.S. at 323, 106 S.Ct. 2548). If the moving party "fails to meet this initial burden, the motion must be denied, regardless of the nonmovant's response." *Little*, 37 F.3d at 1075.

If the moving party meets this burden, Rule 56(c) requires the nonmovant to go beyond the pleadings and show by affidavits, depositions, answers to interrogatories, admissions on file, or other admissible evidence that specific facts exist over which there is a genuine issue for trial. *See Wallace v. Texas Tech Univ.*, 80 F.3d 1042, 1047 (5th Cir. 1996). The nonmovant's burden may not be satisfied by conclusory allegations, unsubstantiated assertions, metaphysical doubt

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issue is determinative of the entire action, this Court need not address Gillespie County's other grounds for summary judgment. Likewise, because the Court determines that Rothgery's Sixth Amendment right to counsel did not attach on July 16, 2002, the Court need not address Rothgery's allegations in his complaint that Gillespie County follows a policy, practice, and custom that involves failure to adequately train, supervise, and monitor county employees to whom the responsibility for preliminary processing of requests for appointed counsel has been delegated and failure to adequately monitor appointed counsel.

as to the facts, or a scintilla of evidence. *See Wallace*, 80 F.3d at 1047; *Little*, 37 F.3d at 1075. Factual controversies are to be resolved in favor of the nonmovant, "but only when there is an actual controversy, that is, when both parties have submitted evidence of contradictory facts." *Little*, 37 F.3d at 1075. The court will not, "in the absence of any proof, assume that the nonmoving party could or would prove the necessary facts." *Little*, 37 F.3d at 1075.

In order to determine whether or not summary judgment should be granted, an examination of the substantive law is essential. Substantive law will identify which facts are material in that "[o]nly disputes over facts that might affect the outcome of the suit under the governing [812] law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-51, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

III. Analysis

In pertinent part, the Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI. The purpose of the Sixth Amendment is to protect "the unaided layman at critical confrontations with his adversary." *U.S. v. Gouveia*, 467 U.S. 180, 189, 104 S.Ct. 2292, 81 L.Ed.2d 146 (1984). The Sixth Amendment right to counsel attaches only at or after the initiation of adversary judicial proceedings against the defendant. *See Gouveia*, 467 U.S. at 187, 104 S.Ct. 2292; *Kirby v. Illinois*, 406 U.S. 682, 688, 92 S.Ct. 1877, 32 L.Ed.2d 411 (1972). The initiation of adversary judicial criminal proceedings may be by way of formal charge, preliminary hearing, indictment, information, or arraignment. *See Kirby*, 406 U.S. at 689, 92 S.Ct. 1877. Federal courts look to state law in evaluating whether adversary judicial proceedings have been initiated. *See Moore v. Illinois*, 434 U.S. 220, 228, 98 S.Ct. 458, 54 L.Ed.2d 424 (1977).

The Texas Court of Criminal Appeals has not set forth a "bright-line rule" to determine when adversary judicial pro-

ceedings begin. *See Hidalgo v. State*, 983 S.W.2d 746, 752 (Tex.Crim.App.1999). In fact, the "caselaw is somewhat indeterminate on the question of what events may serve to initiate adversary judicial proceedings for Sixth Amendment purposes." *Green v. State*, 872 S.W.2d 717, 720 (Tex.Crim.App.1994). Rather than following a bright-line rule as to when adversary judicial proceedings have begun, Texas courts focus on whether a particular event is a critical stage to which a person's Sixth Amendment right to counsel attaches. *See Hidalgo*, 983 S.W.2d at 752. Generally, Texas courts consider whether "the accused requires aid in coping with legal problems or assistance in meeting his adversary" in determining if an event is a critical stage. Id. Although this Court is bound by Texas courts' interpretation of the law governing its proceedings, this Court is not bound by the opinions of Texas courts concerning what constitutes a critical stage of prosecution under the Sixth Amendment. *See Coleman v. Alabama*, 399 U.S. 1, 9, 90 S.Ct. 1999, 26 L.Ed.2d 387 (1970) (rejecting Alabama Court of Appeal's conclusion that preliminary hearing was not critical stage).

The first issue before the Court is whether formal charges were filed against Rothgery on July 16, 2002, that initiated adversary judicial proceedings against him under *Kirby*. Rothgery contends that formal charges were filed against him when the arresting officer presented his Affidavit of Probable Cause to Judge Schoessow.[8] Rothgery argues that the probable-cause affidavit is a complaint under Texas law that initiated adversary judicial proceedings against him.

To support his contention, Rothgery relies on Article 15.04 of the Texas Code of Criminal Procedure, which states that "the affidavit made before the magistrate or district or county attorney is called a 'complaint' if it charges the commission of an offense." TEX. CODE CRIM. PROC. ANN. art.

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[8] It is undisputed that Rothgery had not yet been indicted or charged by information on July 16, 2002. Further, no party suggests that Rothgery was presented for arraignment before Judge Schoessow on July 16, 2002.

15.04 (West 2005). Article 15.04 is found in the chapter of the Texas Code of Criminal Procedure titled "Arrest Under War- [813] rant." *See* TEX. CODE CRIM. PROC. ARTS. 15.01-15.27 (West 2005 & West Supp. 2005). It is undisputed, however, that Rothgery was arrested without a warrant on July 15, 2002.[9] Although there is little case law on the issue, it appears that Texas courts have construed Article 15.04 as applying only to affidavits made in support of arrest warrants. For instance, in *Huynh v. State*, 901 S.W.2d 480, 481 n. 3 (Tex.Crim.App.1995), the court explained that "[a] complaint is a sworn affidavit charging the commission of an offense and serves as the basis for an arrest warrant." Judge Meyers noted in his concurrence in *Green* that

> [i]t is well to remember in this context that the word "complaint" has come to mean at least two different things under Texas law. First, it describes a sworn affidavit upon the basis of which a magistrate may issue a warrant of arrest. Tex. Code Crim. Proc. Ann. arts. 15.03(a) 2, 15.04, 15.05. In this sense, it does not refer to a criminal pleading. *Wooldridge v. State*, 653 S.W.2d 811, 814 n. 6 (Tex.Crim.App.1983).

Green, 872 S.W.2d at 731 n. 5 (Meyers, J., concurring). Likewise, one Texas court has explained that an "affidavit supporting an arrest warrant is called a complaint." *Weems v. State*, 167 S.W.3d 350, 355 (Tex. App.—Houston [14th Dist.] 2005, pet ref'd.). Echoing Judge Meyers's statement in his *Green* concurrence, the same court has explained that "[t]he Code of Criminal Procedure uses the term 'complaint' to refer to both the affidavit supporting an application for an arrest warrant and the written document alleging an offense that it sworn to before a prosecutor." *Merritt v. State*, 76 S.W.3d 632, 633 n. 1 (Tex.App.—Houston [14th Dist.] 2002, no pet.) citing TEX. CODE CRIM. PROC. ANN. arts 2.04, 15.04 (West 2005).

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[9] Chapter 14 of the Texas Code of Criminal Procedure, titled "Arrest Without Warrant," governs warrantless arrests. *See* TEX. CODE CRIM. PROC. ANN. arts. 14.01-14.06 (West 2005 & West. Supp. 2005).

No court, however, has expressly held that Article 15.04 applies only to affidavits given in support of arrest warrants. At the same time, the Court has found no case holding, or even discussing the possibility, that Article 15.04 applies to affidavits given in support of a probable-cause determination following a warrantless arrest. Rothgery relies on *Nehman v. State*, 721 S.W.2d 319 (Tex.Crim.App.1986) in support of his argument that formal charges were filed against him on July 16, 2002. The *Nehman* court concluded that adversary judicial proceedings had been initiated by the time the accused's Article 15.17 warnings[10] were given and held the accused's confession inadmissible. *See id.* at 322-23. The *Nehman* court stated that "formal judicial proceedings had been initiated by the time of appellant's Art. 15.17 'warning hearing.'" *Id.* at 323 n. 2. Although the *Nehman* court did not elaborate further on how the "formal judicial proceedings" had been initiated, the opinion reflects that a warrant for appellant's arrest had been issued and that appellant had been advised of his rights under *Miranda v. Arizona*,[11] including his right to counsel, before the Article 15.17 warnings were given. *See id.* at 320. Because Rothgery was not arrested pursuant to a warrant, the Court finds *Nehman* distinguishable. The Court concludes that Article 15.04 is inapplicable to the facts of this case.

Additionally, the Texas Court of Criminal Appeals has observed that Texas law [814] requires prompt probable-cause determinations for individuals arrested without a warrant to satisfy the Fourth Amendment. *See Green*, 872 S.W.2d at 721. Specifically, the *Green* court explained that "[b]ecause appellant was arrested without a warrant, it was necessary under the Fourth Amendment for the State promptly to obtain a probable cause determination 'as a condition of any significant pretrial restraint of liberty.'" *Id.* citing *Gerstein v. Pugh*, 420 U.S. 103, 125, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975). It thus appears to this Court that, under

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[10] *See supra* note 2.

[11] 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

Texas law, the purpose of presenting the probable-cause affidavit to Judge Schoessow on July 16, 2002, was to establish that probable cause existed under the Fourth Amendment for arresting Rothgery without a warrant, not to formally charge him with an offense under Texas law or *Kirby*.

Following Texas jurisprudence, the Court concludes that Article 15.04 does not apply to the probable-cause affidavit presented to Judge Schoessow in support of Rothgery's warrantless arrest. The Court further concludes that the probable-cause affidavit presented to Judge Schoessow on July 16, 2002, is not a complaint under Texas law formally charging Rothgery with an offense under *Kirby*. Since no formal charges were filed against Rothgery on July 16, 2002, adversary judicial proceedings were not initiated against him at that time, and his Sixth Amendment right to counsel did not attach.

In light of this Court's determination that no formal charges had been filed against Rothgery with the presentation of the probable-cause affidavit to Judge Schoessow, the Court agrees with Gillespie County that Rothgery's appearance before Judge Schoessow on July 16, 2002, did not initiate adversary judicial proceedings under Texas law. On July 16, 2002, pursuant to Article 15.17(a), Judge Schoessow advised Rothgery of his rights, informed him of the crime accused, advised him of the right and procedures for obtaining counsel, determined probable existed for his detention and set bond. *See* TEX CODE CRIM. PROC. ANN. art. 15.17(a). The Texas Court of Criminal Appeals has held that the giving of Article 15.17 warnings does not initiate adversary judicial proceedings. *Wyatt v. State*, 566 S.W.2d 597, 600 (Tex.Crim.App.1978). The *Wyatt* court stated that "[i]t is clear that the form signed and relied upon by appellant is simply an acknowledgment that a magistrate's warning was given pursuant to Article 15.17.... We cannot conclude that informing the defendant of the accusation against him constitutes the initiation of adversary criminal procedures." *Id.* Further, the *Green* court observed that "[o]ther than its Article 15.17 aspect, the PIA [preliminary initial appearance],

per se, is not a requirement of state law." *Green*, 872 S.W.2d at 722. The *Green* court explained that nothing that occurred at the defendant's preliminary initial appearance "required the aid of counsel to cope with any legal problem or assist in meeting the prosecutorial adversary." *Id.* at 721.[12] Additionally, the *Green* court stated, in *dicta*, that the possibility that an attorney could contest bail "does not convert the PIA [preliminary initial appearance] into a critical stage." [815] *Green*, 872 S.W.2d at 722. Although not bound by the state court's critical-stage determination, the Court is persuaded that the determination is reflective of the Texas Court of Criminal Appeals' view that adversary judicial proceedings are not initiated by an appearance before a magistrate for Article 15.17 warnings and the setting of bail.

The Court concludes that no adversary judicial proceedings were initiated against Rothgery under Texas law on July 16, 2002, when Rothgery appeared before Judge Schoessow. Gillespie County is correct that Rothgery's Sixth Amendment right to counsel did not attach at that time.

This Court's holding that neither the presentation of the probable-cause affidavit to Judge Schoessow or Rothgery's appearance before Judge Schoessow on July 16, 2002 initiated adversary judicial proceedings against Rothgery under Texas law is consistent with Supreme Court and Fifth Circuit precedent. The Supreme Court has repeatedly stated that "the initiation of judicial criminal proceedings is far from a mere formalism." *Kirby*, 406 U.S. at 689, 92 S.Ct. 1877. Rather, the initiation of judicial criminal proceedings

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[12] In *Green*, the defendant was arrested without a warrant, charged by felony complaint the day after his arrest, and subsequently presented to a magistrate pursuant to Article 15.17. Despite the State's invitation, the Texas Court of Criminal Appeals declined to hold that adversary judicial proceedings can only be initiated in a felony prosecution by the filing of an indictment. *See Green*, 872 S.W.2d at 720. Rather, the court held that an appearance before a magistrate under Article 15.17 and a probable-cause determination, following a warrantless arrest, is not a critical stage, even if adversary judicial proceedings have been initiated. *See id.*

> is the starting point of our whole system of adversary criminal justice. For it is only then that the government has committed itself to prosecute, and only then that the adverse positions of government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law. It is this point, therefore, that marks the commencement of the 'criminal prosecutions' to which alone the explicit guarantees of the Sixth Amendment are applicable.

Id. at 689-90, 92 S.Ct. 1877.

Although the Supreme Court has extended the Sixth Amendment's right to counsel to certain "critical stages" of criminal proceedings, it has done so in limited circumstances. *See Gouveia*, 467 U.S. at 189, 104 S.Ct. 2292. In the narrow instances where the Supreme Court has recognized that an accused Sixth's Amendment right attaches at a pretrial proceeding,

> the accused [is] confronted, just as at trial, by the procedural system, or by his expert adversary, or by both, *United States v. Ash*, *supra*, 413 U.S. at 310, 93 S.Ct. at 2574, in a situation where the results of the confrontation "might well settle the accused's fate and reduce the trial itself to a mere formality." *United States v. Wade*, supra, 388 U.S. at 224, 87 S.Ct. at 1930.

Gouveia, 467 U.S. at 188-89, 104 S.Ct. 2292. Accordingly, the Sixth Amendment right to counsel can attach at pre-indictment preliminary hearings, if an accused is confronted with prosecutorial forces and witnesses against him. *See Coleman*, 399 U.S. at 10, 90 S.Ct. 1999. In such instances, "the guiding hand of counsel at the preliminary hearing is essential to protect the indigent accused against an erroneous or improper prosecution." *Id.* at 9, 90 S.Ct. 1999.

The Fifth Circuit has held that an adversary criminal proceeding has not begun where the prosecution officers are

unaware of either the charges or the arrest. *See McGee v. Estelle*, 625 F.2d 1206, 1208 (5th Cir. 1980). The Fifth Circuit reasoned that an appearance before a magistrate for statutory warnings does not trigger the adversary process under Texas law because it does not involve counsel for the state and is not a formal charging. *See id.* at 1209. Rather, such an appearance "is for the purpose of complying with the requirements set forth in *Miranda v. Arizona*." *Id.*

[816] The Court notes that the summary-judgment record does not reflect any involvement of the Gillespie County District Attorney's Office on July 16, 2002. There is no summary-judgment proof that a prosecutor from the Gillespie County District Attorney's Office was present at Rothgery's July 16, 2002, appearance before Judge Schoessow or involved in any way in the probable-cause determination. To the contrary, the summary-judgment proof demonstrates that no decision had been made by the Gillespie County District Attorney's Office on July 16, 2002, to prosecute Rothgery for the criminal offense of unlawfully carrying a firearm by a felon. As the warnings form that Judge Schoessow presented to Rothgery reflects, no charges had been filed against Rothgery at that time. Rather, the form reflects that charges "will be filed" in Gillespie County district court.

For this Court to find that Rothgery's Sixth Amendment right to counsel attached on July 16, 2002, the Court would have to conclude that a warrantless arrest plus Article 15.17 warnings and a subsequent probable-cause determination, without involvement by prosecutorial forces, is sufficient to trigger the Sixth Amendment right to counsel. Such a holding would violate Supreme Court precedent equating adversary judicial proceedings with criminal prosecutions, which necessarily implies involvement, or, at a minimum, awareness of the prosecutor. *See McNeil v. Wisconsin*, 501 U.S. 171, 175, 111 S.Ct. 2204, 115 L.Ed.2d 158 (1991) (Sixth Amendment right to counsel "does not attach until a prosecution is commenced, that is, at or after the initiation of adversary judicial criminal proceedings-whether

by way of formal charge, preliminary hearing, indictment, information, or arraignment") quoted in *Texas v. Cobb*, 532 U.S. 162, 167-68, 121 S.Ct. 1335, 149 L.Ed.2d 321 (2001); *Gouveia*, 467 U.S. at 188, 104 S.Ct. 2292 (Sixth Amendment requires existence of both criminal prosecution and accused). Further, such a holding would be dangerously close to violating the clear statement in *Gouveia* that the Sixth Amendment right to counsel does not attach at the time of arrest.[13] *See Gouveia*, 467 U.S. at 190, 104 S.Ct. 2292. Finally, such a holding would be inconsistent with Texas law regarding initiation of adversary judicial proceedings. *See Green* 872 S.W.2d at 720; *Nehman*, 721 S.W.2d at 323; *Wyatt*, 566 S.W.2d at 600.

[817] In conclusion, the Court finds that no adversary judicial proceedings were initiated on July 16, 2002, under Texas law, either by way of the presentation of the probable

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[13] In explaining that the Sixth Amendment right to counsel does not attach at the time of arrest, then Justice Rehnquist differentiated between the Sixth Amendment rights to counsel and to speedy trial. Although the Sixth Amendment's speedy-trial guarantee may attach before an indictment, and as early as the time of arrest and holding to answer a criminal charge, the Supreme Court had never held that the Sixth Amendment's right to counsel attaches at the time of arrest.

> This difference is readily explainable, given the fact that the speedy trial right and the right to counsel protect different interests. While the right to counsel exists to protect the accused during trial-type confrontations with the prosecutor, the speedy trial right exists primarily to protect an individual's liberty interest, "to minimize the possibility of lengthy incarceration prior to trial, to reduce the lesser, but nevertheless substantial, impairment of liberty imposed on an accused while released on bail, and to shorten the disruption of life caused by arrest and the presence of unresolved criminal charges." *United States v. MacDonald*, *supra*, 456 U.S. at 8, 102 S.Ct. at 1502. *See Barker v. Wingo*, 407 U.S. 514, 532-533, 92 S.Ct. 2182, 2192-2193, 33 L.Ed.2d 101 (1972); *United States v. Marion*, *supra*, 404 U.S. at 320, 92 S.Ct. at 463.

Gouveia, 467 U.S. at 190, 104 S.Ct. 2292. The distinction between the right to counsel and right to speedy trial further persuades the Court that the July 16, 2002 appearance did not initiate adversary judicial proceedings against Rothgery, as Rothgery was not held "to answer a criminal charge," but, instead, was only informed of the accusation against him.

cause affidavit to Judge Schoessow or by Rothgery's appearance before Judge Schoessow. Thus, Rothgery's Sixth Amendment right to counsel did not attach on July 16, 2002. The Court concludes that Gillespie County did not violate Rothgery's Sixth Amendment rights by failing to appoint Rothgery counsel from July 16, 2002 until January 23, 2003.[14]

Turning to Rothgery's Fourteenth Amendment allegations, Rothgery alleges that Gillespie County violated his right to due process and to equal protection under the law by denying him access to counsel, in part, by delaying appointment of counsel for six months. The Sixth Amendment's right to counsel applies to the states through the Fourteenth Amendment. *See Gideon v. Wainwright*, 372 U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). A person's Sixth and Fourteenth Amendment right to counsel attaches only at or after the time that adversary judicial proceedings have been initiated against him. *See Kirby* 406 U.S. at 688, 92 S.Ct. 1877. Because this Court has determined that no adversary judicial proceedings were initiated against Rothgery on July 16, 2002, and that his right to counsel under the Sixth Amendment did not attach at that time, Gillespie County did not unconstitutionally deny Rothgery access to counsel. Thus, there is no violation of the Fourteenth Amendment under either the due process or equal protection clauses.

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[14] The Court recognizes that Rothgery testified in his deposition that he requested counsel on January 19, 2003, and that no counsel was appointed based on this request. As previously noted, this request is not included in the summary-judgment proof. Only the January 23, 2003 request, upon which Judge Ables acted immediately is before the Court. Construing, as the Court must, all facts in favor of Rothgery, the Court presumes Rothgery did request counsel on January 19, 2003. Gillespie County's failure to appoint counsel on January 19, 2003, is, at best, negligence, and not indicative of a policy, practice, or custom to avoid appointing counsel. As soon as Judge Ables was advised of Rothgery's January 23, 2003 request, Judge Ables appointed counsel.

IV. Conclusion

IT IS THEREFORE ORDERED that Defendant Gillespie County's Motion for Summary Judgment (Doc. # 28) is **GRANTED.**

APPENDIX C

Affidavit Of Probable Cause

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF TEXAS, I, Ken James, a Texas Peace Officer, being duly sworn, do state upon my oath that:

[x] I have personal knowledge that:

[ ] I have good reason to believe, and do believe, based upon the following information:

on (date) 7-15-02 at about (time) 10:36 AM at (location) 78 FM 2093, Fredericksburg Gillespie County, Texas, the following occurred:

Defendant was fired as manager of Oakwood RV Park on 07-14-02. He became very upset and verbally abusive towards the owner. On 07-15-02 the Defendant was reported to be walking around the RV Park with a gun belt on, carrying a pistol, handcuffs, mace spray, extra bullets and a knife. Officers arrived and located the subject in possession of a firearm. A check showed that the subject was a convicted felon for possession controlled substance in 1996. Walter A Rothgery was convicted 05-30-1996 in Orange Co. California for possess controlled substance felony. On 07-15-02 at 10:36 AM he was in possession of a firearm in a public place. To wit: Oakwood RV Park located at 78 FM 2093 Fredericksburg, Texas.

7/16/02 at 8:15 AM

and I charge that heretofore, on or about the 15 day of July, 2002, in the County of Gillespie and the State of Texas, Defendant, Walter A. Rothgery did then and there commit the offense of unlawful possession of a firearm by a felon—3rd degree felony P.C. 46.04

AGAINST THE PEACE AND DIGNITY OF THE STATE.

/s/_____

Affiant

Sworn to and Subscribed before me by Ken Jones, a credible person this 15th day of July, 2002.

/s/_____
Notary

[STAMP: PEDRO B. GARCIA
Notary Public
STATE OF TEXAS
My Comm. Exp. 12/03/05]

ON THE 16TH DAY OF JULY, 2002, I HEREBY ACKNOWLEDGE I HAVE EXAMINED THE FOREGOING AFFIDAVIT AND HAVE DETERMINED THAT PROBABLE CAUSE EXISTED FOR THE ARREST OF THE INDIVIDUAL ACCUSED THEREIN.

/s/_____
MAGISTRATE

Defendant's Identifiers:
*****

[STAMP: received 1-21-03 from G.C.S.D.]

APPENDIX D

Warning by Magistrate (Setting Bail & Right to Attorney)
State of Texas, County of Gillespie

This is to certify that I, acting as and in the capacity of a magistrate, in clear language, and in person, did inform:

Name: Walter Allen Rothgery Case Number _____

1. You are accused of the criminal offense of: unlawful possession of a firearm by a felon which will be filed in 216th District Court, Gillespie Court.
2. If peace officers or attorneys representing the state question you, you have the right to have a lawyer present. You have the right to talk to your lawyer before being questioned, to have your lawyer with you while being questioned and the right to stop the questioning at any time. If you cannot afford to hire a lawyer, you have the right to have one appointed.
3. You have the right to remain silent and are not required to make a statement, either oral or written. Any statement you make can be used as evidence against you in court.
4. In felony cases, you have the right to an examining trial.

YOUR BOND IS SET AT: 5,000.00 (Cash/Surety)/(~~Personal Bond~~)/(Bond ~~Not Determined~~)

I have further (in clear language understood by the accused) informed the accused:

1. If you cannot pay for a lawyer, you can request one right now.
2. You would have to fill out a sworn statement about your work, what you own, your expenses and family.
3. If you need help filling out the form, someone will help you.

4. These are the time frames. Your request will be sent to the judge of your case within 24 hours. He/she has 3 days to decide if you get a court appointed lawyer. If a lawyer is appointed, s/he will try to contact you by the end of the next first working day.

I, the magistrate in this case, hereby certify that

1. The law enforcement agency having custody of the named accused has brought the accused before this magistrate not later than 48 hours after arrest.
2. I have informed the accused of his/her right to request appointment of an attorney, if indigent, and the procedures for requesting appointment of an attorney.
3. If the accused does not speak and/or understand the English language or is deaf, I have informed the accused in a manner consistent with the Tx CCP Art. 38.30 and 38.31.
4. I have ensued that all reasonable assistance in completing the necessary forms for the requesting appointment of an attorney has been provided.
5. A record of the magistrate's advising the accused of the right to appointed attorney has been prepared in accordance with the law and such record consists of this document signed by me as Magistrate, a copy of which was provided to the accused person.

I, the magistrate in this case, do certify that I am the duly elected or appointed Justice of the Peace, ____ Precinct #1/ _x_ Precinct #2/ ___ Fredericksburg Municipal Judge in Gillespie County, Texas and further certify that:

(x) The accused has announced the intention to waive right to counsel at this time _/s/_ (initials)

( ) The accused has announced s/he is not indigent and does not wish appointment of attorney at this time. __ (initials)

( ) The accused is being held on a misdemeanor accusation and has claimed s/he is indigent and has requested court appointed counsel. The Affidavit of Indigence and Request for Attorney is to be referred within 24 hours to the Gillespie County Judge for determination of indigence and if appropriate, appointment of attorney in accordance with the plan approved by the District Judge of Gillespie Country, TX /_____

( ) The accused is being held on a felony accusation and has claimed s/he is indigent and has requested court appointed counsel. The Affidavit of Indigence and Request for Attorney is to be referred within 24 hours to: the District Judge of Gillespie County, TX for determination of indigence and, if appropriate, appointment of attorney in accordance with the plan approved by the District Judge of Gillespie County, TX/

_____

X /s/_____ /s/_____

PERSON WARNED Magistrate, Gillespie County Texas

Date and Time: July 16, 2002 at 8:30 AM Witness: /s/___

[STAMP: received 1-21-03 from [illegible]]

APPENDIX E

KNOW ALL MEN BY THESE PRESENTS:

THE STATE OF TEXAS)
COUNTY OF Gillespie)

THAT WE, Walter Allen Rothgery, as principal, and HELEN ALLRED D/B/A A-TEX BONDING, as Sureties, are held and firmly bound unto the State of Texas in the penal sum of Five Thousand ($5,000) Dollars, for the payment of which sum, well and truly to be made, and in addition all necessary and reasonable fees and expenses that may be incurred by Peace Officers in rearresting principal in the event the conditions of this bond are violated, we do bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

THE CONDITION OF THE ABOVE OBLIGATION IS SUCH that whereas the above named principal, Walter Allen Rothgery stands charged by complaint duly filed in the Justice of Peace Court, Precinct No. ___, of Gillespie County, Texas with the offense of a _____ felony, to wit:

Unlawful Possession of a Firearm by a Felon

And the said Walter Allen Rothgery was, by order of said Magistrate, required to give bail in the sum of $5,000 for his personal appearance before the 216th District Court _____ of Gillespie County, Texas.

NOW if the said Walter Allen Rothgery shall well and truly make his personal appearance instanter before the 216th District Court _____ of Gillespie County, Texas, as its present term, if now in session, or at its next regular term if now in vacation, to be held at the Court House of Gillespie County, in the City of Fredericksburg Texas, and further shall well and truly make his appearance before any other court to which the same may be transferred and for any and all subsequent proceedings that may be had relative to the said charge in the course of the criminal action based on said charge, and there remain from day to day and from term to

term of said court, until discharge by due course of law, then and there to answer said accusation against him, this obligation shall become void; otherwise to remain in full force and effect.

WITNESS OUR HANDS this the 16th day of July 2002.

Examined, approved and taken this 16th day of July 2002.

Milton Jung

Sheriff Gillespie County, Texas

By /s/_____ Deputy

/s/_____ Principal

78 FM 2093 (Box 218 B) Fby TX70614

A-Tex Bonding Surety

P.O. Box 276, Buchanan Dam, Texas 78609

(512) 793-2876

/s/_____ Surety

_____

[STAMP: received 1-21-03 from G.C.S.D.]

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No. 07-440

FILED
OCT 31 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

WALTER ALLEN ROTHGERY,

Petitioner,

v.

GILLESPIE COUNTY, TEXAS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Can a municipality be liable for damages under 42 U.S.C. §1983 for failing to appoint counsel under the Sixth Amendment at a Preliminary Initial Appearance where the arrestee has not been subject to a formal charge, preliminary hearing, indictment, information or arraignment?

PARTIES TO THE PROCEEDING

Respondent:

Gillespie County, Texas by and through their attorneys of Record, Charles S. Frigerio and Hector X. Saenz, *Law Offices of Charles S. Frigerio, P.C.*, 111 Soledad, Suite 840, San Antonio, TX 78205.

Petitioners:

Walter Allen Rothgery by and through his attorneys of record, Andrea Marsh, Harry Williams IV, *Texas Fair Defense Project*, 510 South Congress Ave., Suite 208, Austin, TX 78704; William Christian, *Graves Dougherty Hearon & Moody, P.C.*, 401 Congress Avenue, Suite 2200, Austin, TX 78701; Seth P. Waxman, Craig Goldblatt, Danielle Spinelli, D. Hien Tran, *Wilmer Cutler Pickering Hale and Dorr LLP*, 1875 Pennsylvania Ave., N.W., Washington, DC 20006.

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OPINIONS

The judgment of the Honorable Lee Yeakle, United States District Judge, Western District of Texas, Austin Division entered on February 2, 2006 is published at 413 F.Supp.2d 806 (W.D. 2006) (App. A – 1-18). The opinion of the United States Court of Appeals for the Fifth Circuit entered on June 28, 2007 is published at 419 F.3d 293 (5th Cir. 2007) (App. B – 19-44).

JURISDICTION

Rule 10 of the Rules of the Supreme Court of the United States provides that a review on a writ of certiorari is not a matter of right but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. Compelling reasons are indicated if the decision leading to the petition contributes to a conflict of authority between the Courts of Appeal or State Courts of last resort; reflects a departure from the usual course of proceedings; or presents an important question of federal law that has not been but should be settled by this Court.

Petitioner has not set forth an adequate basis to justify the exercise of this Court's discretionary jurisdiction. There is no conflict of authority which should be settled by this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. VI.

> "*In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defence.*"

42 U.S.C. §1983

> "Every person who, under color of any statute, ordinance, regulation, custom or usage, of any state . . . subjects or causes to be subjected, any citizen of the United States or person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, sued in equity or other proper proceeding. . . ."

STATEMENT OF THE CASE

1. Factual Background.

The case at bar concerns the warrantless arrest of Petitioner Rothgery on July 15, 2002. Rothgery was masquerading as a security guard wearing a holster and handgun at an RV park in Fredericksburg, Texas. Petitioner was charged with unlawful possession of a firearm by a felon which is a third degree felony under the Texas Penal Code, Chapter 46, §46.04.

On July 16, 2002, Rothgery was advised of his statutory warnings pursuant to the Tex. Code of Crim. Proc. Ann., art. 15.17(a) by Justice of the Peace Schoessow. In Texas, this is referred to as the Preliminary Initial Appearance (PIA). At the Preliminary Initial Appearance, the magistrate advised Rothgery of his rights under *Miranda*, informed him of the crime accused, advised him of his right to counsel, determined probable cause existed for his detention and set bond. Petitioner Rothgery waived his right to counsel and was released on bond. (See, App. C – 45-48). At some time subsequent to July 16, 2002, Petitioner Rothgery alleges he submitted a form requesting appointment of counsel to the Gillespie County Jail Administration. This form was evidently lost by the administration at the jail and not forwarded to the District Court. In any event, Petitioner Rothgery remained out on bond from the period of July 16, 2002 until January 18, 2003 when he was arrested subsequent to being indicted. During this time frame, Rothgery attempted to retain counsel but was unsuccessful. The fact is undisputed that no law enforcement officer or prosecutor attempted to interview Rothgery during said time frame.

2. Legal Issues.

Petitioner Rothgery alleges that his Sixth Amendment Right to Counsel attached at the Preliminary Initial Appearance conducted under Tex. Code of Crim. Proc. Ann., art. 15.17(a). However, in Texas, the Preliminary Initial Appearance under

Article 15.17(a) does not initiate adversary judicial proceedings. The Preliminary Initial Appearance under Article 15.17 is to obtain a probable cause determination as dictated by *Gerstein* v. *Pugh*, 420 U.S. 103, 125 (1974).

On July 16, 2002, Rothgery was not subject to a formal charge, preliminary hearing, indictment, information or arraignment and therefore, his Sixth Amendment right to counsel did not attach. Point in fact, Petitioner Rothgery waived his right to counsel at the Preliminary Initial Appearance. Subsequent to being released on bond, Rothgery claims to submitting request for counsel forms on at least one occasion to the Gillespie County Jail Administration. During the almost six months Petitioner was out on bond, he did not experience any critical pretrial proceedings where he was confronted, just as at trial, by the procedural system, or by his expert adversary in a situation where the results of the confrontation might well settle the accused's fate and reduce the trial itself to a mere formality as envisioned in *United States* v. *Wade*, 388 U.S. 218, 224 (1967).

Petitioner Rothgery's burden under *Monell* is to show that Gillespie County had a custom and policy that directly caused his alleged constitutional deprivation. *Bd. of County Comm'rs of Bryan County, Oklahoma* v. *Brown*, 520 U.S. 397 (1997). Petitioner Rothgery failed to put forth any evidence showing that a custom or policy of Gillespie County caused Plaintiff to sustain a violation of his civil rights under the Sixth Amendment. Rothgery waived his right to

counsel under the Sixth Amendment at the Preliminary Initial Appearance and Petitioner has failed to proffer evidence of municipal liability under 42 U.S.C. §1983 concerning Plaintiff's Sixth Amendment right to counsel.

3. Proceedings Below.

Petitioner Rothgery's Complaint is brought pursuant to 42 U.S.C. §1983 on the grounds that Gillespie County violated his Sixth Amendment Right to Counsel by not appointing Counsel for him at his Preliminary Initial Appearance on July 16, 2002. Rothgery, in fact, waived his right to counsel at the Preliminary Initial Appearance on July 16, 2002.

The District Court granted Respondent Gillespie County's Motion for Summary Judgment holding that the Petitioner's Sixth Amendment right to counsel did not attach at his Preliminary Initial Appearance under Article 15.17 on July 16, 2002. The trial court's holding is consistent with Texas law (*Green* v. *State*, 872 S.W.2d 717, 722 (Tex. Crim. App. 1994)), with this Court's precedent (*United States* v. *Gouveia*, 467 U.S. 180, 189 (1984)) and Fifth Circuit precedent (*McGee* v. *Estelle*, 625 F.2d 1206, 1208 (5th Cir. 1980). The Fifth Circuit affirmed the trial court's granting of summary judgment and affirmed its holding in *McGee* v. *Estelle*, 625 F.2d 1206 (5th Cir. 1980) that the Sixth and Fourteenth Amendment right to counsel does not attach in Texas on a warrantless arrest when the arrestee appears before a Magistrate for

statutory warnings. *Rothgery* v. *Gillespie County*, 491 F.3d 293, 294 (5th Cir. 2007).

REASONS FOR DENYING WRIT OF CERTIORARI

1. Fifth Circuit.

Both the Fifth Circuit in *Rothgery* v. *Gillespie County*, 491 F.3d 293 (5th Cir. 2007) and the trial court's opinion in *Rothgery* v. *Gillespie County*, 413 F.Supp.2d 806 (W.D. 2006) are consistent with this Court's precedent. In *Kirby* v. *Illinois*, 406 U.S. 682 (1972), this Court discussed the starting point for when the initiation of adversary judicial proceedings begins and reasoned as follows:

> *"The initiation of judicial proceedings is far from mere formalism. It is the starting point of our whole system of adversary criminal justice. For it is only then that the government has committed itself to prosecute, and only then that the adverse positions of government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural law. It is this point, therefore, that marks the commencement of the criminal prosecutions to which alone the explicit guarantees of the Sixth Amendment are applicable."* *Id.* at 689-690.

The Fifth Circuit's opinion in the case at bar is consistent not only with the literal language of the Sixth Amendment which requires both the existence of a criminal prosecution and an accused, but also with the purposes which this Court has recognized the right to counsel serves. The "core purpose" of the counsel guarantee is to assure aid at trial, when the accused is confronted with both the intricacies of the law and the advocacy of the public prosecutor. *United States* v. *Ash*, 413 U.S. 300, 309 (1973). While the right to counsel exists to protect the accused during trial type confrontations with the prosecutor, this Court has never held that the right to counsel attaches at the time of arrest. *United States* v. *Gouveia*, 467 U.S. 180, 190 (1984).

In *United States* v. *Gouveia*, 467 U.S. 180 (1984), the Court directly addressed the issue of when the Sixth Amendment right to counsel began in the context of the initiation of adversary judicial proceedings. In *Gouveia*, two federal inmates were convicted of murder. They based their appeal in part on the fact that their rights under the Sixth Amendment were violated when they were held in administrative detention unit without appointment of counsel for approximately nineteen (19) months prior to Grand Jury indictment. The Ninth Circuit Court of Appeals reversed the convictions holding that the prison inmates had a Sixth Amendment right to counsel during the period in which they were held in administrative detention before the return of the indictments. This Court granted a Certiorari and reversed the

Ninth Circuit holding. This Court held that the nineteen (19) month interval pre-indictment of the defendants was not the initiation of any adversary judicial proceedings and therefore, the Sixth Amendment had not attached. As in the case subjudice, Petitioner Rothgery was out on bond for a period of six months at which time no initiation of any adversary judicial proceedings had commenced and his Sixth Amendment right had not attached. As this Court held in *Gouveia*, the mere possibility of prejudice to a defendant resulting from the passage of time is not itself sufficient reason to wrench the Sixth Amendment from its proper context. *Id.* at 191. (quoting *United States* v. *Marion*, 404 U.S. 307, 404 (1971).

The Fifth Circuit's holding in Rothgery reaffirms its previous opinion in *McGee* v. *Estelle*, 625 F.2d 1206 (5th Cir. 1980). In *McGee*, the Court posited the direct inquiry as "*We must determine when an adversary judicial criminal proceeding begins in Texas.*" *Id.* at 1206. The case concerned an arrested suspect apprehended without an arrest warrant for armed robbery. Ft. Worth police officers matched the description of the car McGee was driving at the time of the arrest. The Ft. Worth Detective took McGee before a Texas Magistrate for the requisite statutory warnings under Tex. Code of Crim. Proc. Ann., art. 15.17. Two hours after the magistrate warning, McGee was taken before a lineup where he was identified by the complaining witness. Two months later, McGee was indicted for the armed robbery. McGee asserted that

his appearance before the Magistrate triggered the adversary judicial process. The Court in *McGee* held:

> "*An appearance before the magistrate for statutory warnings under Texas law does not involve counsel for the state, nor is it a formal charge; rather, it is for the purpose of complying with the requirements set forth in Miranda* v. *Arizona*. . . ." *Id.* at 1209.

The Court reasoned that to accept *McGee's* argument would equate the initiation of adversary judicial proceedings under Texas law with the time of arrest. Such a conclusion would be antithetical to the results reached by this Court in *Kirby*.

Petitioner's assertion that the Fifth Circuit decision in the case at bar conflicts with both *Brewer* and *Jackson* is without merit. In *Brewer* v. *Williams*, 430 U.S. 387 (1977), the suspect was arrested in Davenport, Iowa pursuant to a warrant issued out of Des Moines, Iowa. The arrestee was arraigned in Davenport and was represented by counsel in Davenport as well as Des Moines, Iowa. Counsel informed the officers not to interrogate him during the transport from Davenport to Des Moines. Despite being warned not to interrogate arrestee Williams, Det. Leaming engaged in conversation with Williams during the 160 mile drive to Des Moines. During the conversation, Williams admitted to the murder and led police to the body of the victim. This Court held in *Brewer* that subsequent to plaintiff being arraigned in Davenport, Iowa that judicial proceedings had been initiated and the suspect's attorney specifically

related to the officers not to interrogate the arrestee. The Court held that the detectives' interrogation of the arrestee violated plaintiff's Sixth Amendment right to counsel and affirmed the writ of habeas corpus.

In stark contrast to *Brewer,* Rothgery was not arraigned, he waived his right to counsel, and was not questioned by officers or prosecutors. In short, no adversary judicial proceedings were initiated in the case at bar and Petitioner's rights were not violated under the Sixth Amendment.

In *Michigan* v. *Jackson*, 475 U.S. 625 (1986), this Court examined two murder cases out of the state of Michigan involving arrestees who were arraigned, requested counsel be appointed and were subsequently interrogated post arraignment. This Court held that the post arraignment confessions were improperly obtained and affirmed the reversal of their convictions.

In the case at bar, Petitioner was not arraigned, but only informed of the charges against him and bail was set. In *Jackson,* the prosecutor's office approved and issued the complaints and warrants that led to the arraignment. *See, People* v. *Bladell*, 365 N.W.2d 56, 71-72 (Mich. 1984). The arraignment under Michigan law is functionally different than a Preliminary Initial Appearance under Article 15.17 under Texas law. The Fifth Circuit in *McGee* v. *Estelle*, 625 F.2d 1206 (5th Cir. 1980), specifically addressed this issue and held that the Preliminary

Initial Appearance under Art. 15.17 did not initiate adversary judicial proceedings. This Honorable Court denied Certiorari in *McGee* at 449 U.S. 1089 (1981).

Petitioner Rothgery was not subject to a formal charge, preliminary hearing, indictment, information or arraignment at his Preliminary Initial Appearance of July 16, 2002, as a matter of law. *Kirby* v. *Illinois*, 406 U.S. 682, 689 (1972).

2. Other Circuits.

Petitioner's assertion of a conflict in the Sixth, Third and Eleventh Circuits is misplaced.

A. Sixth Circuit.

Petitioner Rothgery cites *Mitzel* v. *Tate*, 267 F.3d 524 (6th Cir. 2001) as an example of a conflict with the case at bar. However, *Mitzel* involved a habeas corpus petition wherein the question presented to the Court was whether or not Mitzel's Sixth Amendment right to counsel was violated by a post polygraph interrogation wherein a statement was taken without Mitzel's attorney being present. Mitzel had been placed under arrest, a complaint issued against him detailing the facts of the offense and he had made an initial appearance before a state judge. In the State of Ohio, the initial appearance is an arraignment wherein the defendant must plead to the charges and request a trial by jury or face waiver of that right. *State* v. *Garris*, 128 Ohio App.3d 126, 130, 713 N.E.2d

1135, 1138 (1998). In the State of Ohio the Initial Appearance is an arraignment under state precedent and therefore, is the initiation of adversary judicial proceedings. Petitioner's assertion to the contrary is not supported by Ohio case law. In any event, the Court in Mitzel determined that the post arraignment statement given by the Plaintiff without his counsel's knowledge was a violation of Mitzel's Sixth Amendment right to counsel but such error was harmless. The Sixth Circuit case of *Mitzel* v. *Tate* is not in conflict with the case at bar.

B. Third Circuit.

Petitioner Rothgery's reliance on *Matteo* v. *Superintendent, SCI Albion,* 171 F.3d 877 (3d Cir. 1991) (en banc) is misguided. In *Matteo,* the Court examined the Massiah Doctrine governing the constitutionality of so-called "secret interrogations". Case precedent establishes three basic requirements for finding of a Sixth Amendment violation in this context:

(1) The right to counsel must have attached at the time of the alleged infringement;

(2) The informant must have been acting as a government agent; and,

(3) The informant must have engaged in deliberate elicitation of incriminating information from the defendant. *Massiah* v. *United States*, 377 U.S. 201, 206 (1964).

In *Matteo* the so-called secret interrogations had occurred at a time subsequent to Matteo having been arrested, arraigned and having retained counsel. In *Matteo*, the Third Circuit held that even if petitioner's Sixth Amendment rights were violated, that the informant was not acting as a government agent and therefore, denied the habeas petition. Once again, Petitioner Rothgery misses the mark. The Third Circuit case of *Matteo* is not in conflict with the case at bar.

C. Eleventh Circuit.

Petitioner Rothgery's reliance on *Fleming* v. *Kemp*, 837 F.2d 940 (11th Cir. 1988), is misplaced. In *Fleming*, another habeas corpus proceeding, the Eleventh Circuit affirmed the denial of the prisoner's writ of habeas corpus finding that any error in admitting of two statements made in response to improper interrogation was harmless. The Fleming Court did not address a proceeding similar to the proceedings under Texas law, Tex. Code of Crim. Proc. Ann., art. 15.17. In *Fleming*, there was an arraignment under Georgia law which initiated adversary judicial proceedings. Under Georgia law, URMC 13.1 entitled, "Initial Appearance Hearing" the judicial officer, inter alia, informs the accused of the charges; informs the accused he has the right to remain silent; determines whether the accused desires and is in need of an appointed attorney; informs the accused of his right to a pre-indictment probable cause hearing . . . informs the accused that if he desires to waive these rights and

plead guilty, he shall so notify the judge. . . . *State* v. *Simmons*, 260 Ga. 92, 390 S.E.2d 43 (1990). As this Court reasoned in *Hamilton* v. *Alabama*, 368 U.S. 52 (1961), an arraignment is a pretrial stage under which the Sixth Amendment attaches since certain defenses can be waived if they are not raised.

Under Texas law, the Preliminary Initial Appearance is not a stage in the proceeding where the arrestee is subject to a formal charge, preliminary hearing, indictment, information or arraignment.

The Eleventh Circuit is not in conflict with the case at bar.

3. Courts of Last Resort.

Petitioner Rothgery's assertion of a conflict among state courts of last resort is misplaced. In *O'Kelly* v. *State*, 604 S.E.2d 509 (Ga. 2004) the Georgia Supreme Court held that the Sixth Amendment right to counsel attached at the arraignment. As previously noted, Georgia law allows for the arrestee to waive certain rights and plead guilty which is in marked contrast to the Texas preliminary appearance.

Similarly, Petitioner cites *State* v. *Jackson*, 380 N.W.2d 420 (Iowa 1986), as an example of a conflict with the Fifth Circuit. However, Petitioner misconstrues the Jackson case. Under Iowa law, the right to counsel attached upon the filing of a complaint by the county attorney followed by the issuance of a warrant. The Court noted that the significant level of

prosecutorial involvement showed that the State had committed itself to prosecution. Iowa case law is not in conflict with the Fifth Circuit.

Petitioner Rothgery further cites *State* v. *Tucker*, 645 A.2d 111 (N.J. 1994); *Bradford* v. *State*, 927 S.W.2d 329 (Ark. 1996); and *Owen* v. *State,* 596 So.2d 985 (Fla. 1992) for his position that a conflict exists. However, all three of these cases deal with arraignments where counsel had been appointed and subsequent statements taken. The cases cited by Petitioner are not analogous with Texas law and the workings of a Preliminary Initial Appearance under Tex. Code of Crim. Proc. Ann., art. 15.17, as a matter of law. There is no conflict between the Fifth Circuit's decision in the case at bar and the decisions of State Courts of last resort.

4. No Conflict.

The Fifth Circuit Opinion of *Rothgery* v. *Gillespie County*, 419 F.3d 293 (5th Cir. 2007) is not in conflict with any opinion of this Court, is not in conflict with any opinion of the Courts of Appeals, nor is it in conflict with any state courts of last resort. In the case at bar, Petitioner Rothgery brought his complaint pursuant to 42 U.S.C. §1983 for civil damages alleging that his civil rights under the Sixth Amendment were violated by not having counsel appointed for him at his Preliminary Initial Appearance on July 16, 2002. Rothgery, in fact, waived his right to counsel at the Preliminary Initial Appearance on July 16, 2002. (See, App. C – 45-48). Petitioner Rothgery failed

to proffer any evidence of a custom or policy of Gillespie County that was a direct proximate cause of Plaintiff's alleged constitutional deprivation. At most, Petitioner proffered evidence of negligence with regard to this single incident which fails to prove municipal liability under *Monell*, as a matter of law. *Bd. of County Comm'rs of Bryan County, Oklahoma* v. *Brown*, 520 U.S. 397 (1997).

CONCLUSION

The trial court properly held that Respondent Gillespie County did not violate Petitioner's Sixth Amendment Rights under 42 U.S.C. §1983 in granting Respondent's Motion for Summary Judgment. The Fifth Circuit Court of Appeals affirmed the trial court's granting of summary judgment to Respondent Gillespie County. There is no compelling reason to grant Petitioner's Writ of Certiorari. Respondent requests that the Petition be denied.

Respectfully submitted,

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OCTOBER 2007

491 F.3d 293

APPENDIX A

United States Court of Appeals,Fifth Circuit.
Walter Allen ROTHGERY, Plaintiff-Appellant,
v.
GILLESPIE COUNTY, TEXAS,
Defendant-Appellee.
No. 06-50267.

June 29, 2007.

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Charles Straith Frigerio (argued), Hector X. Saenz, Law Offices of Charles S. Frigerio, San Antonio, TX, for Defendant-Appellee.

Susanna Dokupil, R. Ted Cruz, Austin, TX, for Amicus Curiae, State of TX.

George E. Dix, University of Texas School of Law, Austin, TX, for Amicus Curiae University of Texas School of Law.

Appeal from the United States District Court for the Western District of Texas.

Before KING, WIENER, and OWEN, Circuit Judges.

KING, Circuit Judge:

In *McGee v. Estelle,* we held that a warrantless arrestee's Sixth and Fourteenth Amendment right to

counsel does not attach in Texas when he appears before a magistrate for statutory warnings if prosecutors are unaware of and uninvolved in the arrest and appearance. 625 F.2d 1206, 1208-09 (5th Cir.1980). The district court in this case reached a similar conclusion where the warrantless arrestee's appearance involved not only statutory warnings, but also a probable cause determination by the magistrate that was supported by a police officer's affidavit accusing the arrestee of committing the relevant offense. Because we agree that the appearance in this case did not commence adversary judicial proceedings for purposes of the Sixth and Fourteenth Amendment right to counsel, we AFFIRM the district court's order granting summary judgment for Gillespie County.

I. FACTUAL AND PROCEDURAL BACKGROUND

On July 15, 2002, officers of the Fredericksburg, Texas Police Department arrested plaintiff-appellant Walter Rothgery without a warrant on suspicion of being a felon in possession of a firearm, which is a third-degree felony in Texas. The suspicion was based on a criminal background check indicating that Rothgery had been convicted of a felony in California. In fact, felony charges against Rothgery in California had been dismissed after Rothgery completed a diversionary program, and both sides agree that Rothgery did not have a felony conviction.

Under the misimpression that Rothgery had a prior felony conviction, the officers booked Rothgery

into the Gillespie County Jail. Rothgery says that he requested in writing the appointment of counsel at this point, though there is no record of the request. The next morning, on July 16, Rothgery was brought before a Justice of the Peace (the "magistrate") to be informed of the accusation against him and to be given statutory warnings under Article 15.17 of the Texas Code of Criminal Procedure, which provides for warnings generally equivalent to those required by *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).[1] Rothgery signed a document reflecting that the magistrate did so and that Rothgery stood "accused of the criminal offense of[ ] unlawful possession of a firearm by a felon which will be filed in 21st District Court." On the document, the magistrate swore that "[t]he accused has announced

[1] Article 14.06 of the Texas Code of Criminal Procedure requires that a person arrested without a warrant be taken before a magistrate within 48 hours of arrest, at which point the magistrate must "immediately perform the duties described in Article 15.17." TEX.CODE CRIM. PROC. ANN. art. 14.06. Article 15.17, which also applies to those who are arrested under warrant, requires that the magistrate inform the arrestee of the accusation against him, of any affidavit filed against him, and of his rights to retain counsel, to have counsel appointed for him if he cannot afford counsel, to remain silent, to have an attorney present during interviews with officers of the state, to terminate interviews at any time, and to have an examining trial to probe the existence of probable cause. *Id.*art. 15.17. The magistrate may also "admit the person arrested to bail if allowed by law." *Id.*

the intention to *waive right to counsel at this time.*"[2] The magistrate set bond at $5,000.

The arresting officer also presented the court with an affidavit titled "Affidavit of Probable Cause." The form document was filled in with the officer's description of the events leading up to the arrest and recited, "I charge that heretofore, on or about the 15[th] day of July, 2002, in the County of Gillespie and the State of Texas, Defendant, Walter A. Rothgery, did then and there commit the offense of unlawful possession of a firearm by a felon-3rd degree felony." Based on the affidavit, the magistrate found that probable cause existed for Rothgery's arrest, signing the document under a portion of text stating, "I hereby acknowledge I have examined the foregoing affidavit and have determined that probable cause existed for the arrest of the individual accused therein." After the appearance, Rothgery posted a surety bond to obtain release from jail. The bond agreement between Rothgery and the bonding company states, among other details of Rothgery's arrest, that "Rothgery stands charged by complaint duly filed in the Justice of Peace Court."

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[2] According to Rothgery, the magistrate told him that he would have to waive his right to an attorney for purposes of the appearance if he wanted to have bail set at that time, and that otherwise he would have to wait in jail until an appointment was made. On the original typed document, only the words "waive right to counsel" were underlined, and Rothgery says that the words "at this time" were also underlined by hand to reflect this limited waiver.

Rothgery says that he repeatedly requested counsel in the months following his release, but no counsel was appointed. On January 17, 2003, six months after his arrest, a grand jury returned an indictment against Rothgery and he was rearrested the next day. Rothgery was brought before the magistrate again on January 19 and he again requested counsel, but no attorney was appointed. On January 23, still with no attorney, Rothgery was transferred to another jail due to overcrowding at the Gillespie County Jail. Finally, after Rothgery requested counsel yet again, a state district judge appointed counsel on January 23, 2003. Once appointed, Rothgery's counsel soon obtained records establishing that Rothgery had not been convicted of a felony. He moved to dismiss the charges, and the motion was granted on April 30, 2003.

On July 15, 2004, Rothgery sued defendant-appellee Gillespie County under 42 U.S.C. § 1983, alleging that the county violated his Sixth and Fourteenth Amendment right to counsel by following a policy of denying appointed counsel to arrestees released from jail on bond and by failing to adequately train and monitor those involved in the appointment-of-counsel process. Rothgery's contention is that counsel should have been appointed for him after his first appearance in the magistrate's court on July 16, 2002, and that the mistake underlying his arrest would have been discovered had counsel been timely appointed. Gillespie County moved for summary judgment on the ground that Rothgery's

Sixth and Fourteenth Amendment right to counsel did not attach until his indictment on January 17, 2003, which marked the initiation of adversary judicial proceedings against him. The district court granted the motion on February 2, 2006, and issued a take-nothing final judgment. Rothgery appeals.[3]

II. STANDARD OF REVIEW

We review a grant of summary judgment de novo, viewing all evidence in the light most favorable to the nonmoving party and drawing all reasonable inferences in that party's favor. *See Crawford v. Formosa Plastics Corp.*, 234 F.3d 899, 902 (5th Cir.2000). "Summary judgment is proper when the evidence reflects no genuine issues of material fact and the non-movant is entitled to judgment as a matter of law." *Id.* (citing FED.R.CIV.P. 56(c)). "A genuine issue of material fact exists 'if the evidence is such that a reasonable jury could return a verdict for the non-moving party.'" *Id.* (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)).

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[3] We are indebted to the Solicitor General of Texas, Ted Cruz, who filed an amicus curiae brief in this appeal at our request, and to Professor George Dix of The University of Texas School of Law, who also filed an amicus curiae brief.

III. DISCUSSION

The Sixth Amendment, which is applicable to the states through the Fourteenth Amendment,[4] provides in relevant part that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI. This right "attaches only at or after the time that adversary judicial proceedings have been initiated . . . whether by way of formal charge, preliminary hearing, indictment, information, or arraignment."[5] *Kirby v. Illinois,* 406 U.S. 682, 688-89, 92 S.Ct. 1877, 32 L.Ed.2d 411 (1972) (citations and footnote omitted). But we do not rely formalistically on the label given to a particular pretrial event when determining the point at which adversary judicial proceedings have been initiated; instead, "the relevant time is when 'the government has committed itself to prosecute' and 'a defendant finds himself faced with the prosecutorial forces of organized

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[4] *Gideon v. Wainwright,* 372 U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). For clarity, we will refer only to the Sixth Amendment when discussing the right to counsel.

[5] After the Sixth Amendment right to counsel attaches, a defendant is entitled to counsel at "critical stages" of the proceedings, absent a valid waiver. *See Michigan v. Jackson,* 475 U.S. 625, 629-30 & n. 3, 632 n. 5, 106 S.Ct. 1404, 89 L.Ed.2d 631 (1986).

Gillespie County does not argue that the time between Rothgery's release on bond and his indictment six months later did not constitute a critical stage of the prosecution, and we do not decide that issue here.

society.'"[6] *Caver v. Alabama,* 577 F.2d 1188, 1195 (5th Cir.1978) (quoting *Kirby,* 406 U.S. at 689, 92 S.Ct. 1877); *see also Lomax v. Alabama,* 629 F.2d 413, 415 & n. 3 (5th Cir.1980) (rejecting the use of "purely formal application of quantitative criteria" to determine when adversary judicial proceedings commenced).

Following this approach in *Lomax v. Alabama,* we instructed that "reliance should be placed on the sometimes elusive degree to which the prosecutorial forces of the state have focused on an individual." 629 F.2d at 415. Accordingly, we held that an arrest, under a warrant secured with a magistrate's probable cause determination, did not commence adversary judicial proceedings because the record did not reflect any prosecutorial awareness of or involvement in the arrest, nor any participation by prosecutors in preparing the "complaint affidavits used to secure" the warrant. *Id.* at 415-16. Similarly, we held in *McGee v. Estelle* that in Texas, "an adversary criminal proceeding has not begun in a case where the prosecution officers are unaware of either the charges or the arrest." 625 F.2d 1206, 1208 (5th Cir.1980). We thus concluded that a warrantless arrestee's lineup and

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[6] "We look to state law to determine when adversarial proceedings against the accused have commenced," *Felder v. McCotter,* 765 F.2d 1245, 1247 (5th Cir.1985), *abrogated on other grounds by Patterson v. Illinois,* 487 U.S. 285, 295-96 & n. 8, 108 S.Ct. 2389, 101 L.Ed.2d 261 (1988), although the ultimate Sixth Amendment consequences of certain state procedures is a matter of federal law.

appearance before a magistrate for Article 15.17 warnings did not initiate adversary judicial proceedings, as prosecutors were unaware of and uninvolved in either event.[7] *Id.* at 1208-09.

It is undisputed in this appeal that the relevant prosecutors were not aware of or involved in Rothgery's arrest or appearance before the magistrate on July 16, 2002. There is also no indication that the officer who filed the probable cause affidavit at Rothgery's appearance had any power to commit the state to prosecute without the knowledge or involvement of a prosecutor. *Compare* TEX.CODE CRIM. PROC. ANN. art. 2.13 (limiting the role of a police officer, in relevant part, to notifying the magistrate of an offense and arresting offenders), *with id.* art. 2.01-.02 (designating district and county attorneys as the representatives of the state in all criminal cases and

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[7] While the opinion did observe at one point that an Article 15.17 warnings appearance before a magistrate "does not involve counsel for the state, *nor* is it a formal charge," *McGee*, 625 F.2d at 1209 (emphasis added), we do not read that to imply that formal charges may exist in Texas without any prosecutorial knowledge or involvement. In context, the statement merely clarified that prosecutors do not participate in such an appearance, nor are formal charges filed. We have not held that prosecutors must actually file the document that initiates adversary judicial proceedings, *see, e.g., Felder*, 765 F.2d at 1246, 1247-48 (noting that a police officer's filing of an affidavit and criminal complaint commenced adversary judicial proceedings), but merely that adversary judicial proceedings cannot initiate without some prosecutorial awareness or involvement, *McGee*, 625 F.2d at 1208; *see also Lomax*, 629 F.2d at 415.

proceedings); *cf. Clawson v. Wharton County,* 941 S.W.2d 267, 272 (Tex.App.-Corpus Christi 1996, writ denied) (recognizing that "the decision not to prosecute is the quintessential function of a prosecutor" (dash omitted)). And Rothgery provides no reason why the officer's acts should somehow be imputed to the prosecutor's office or should otherwise be interpreted to signal that Rothgery was opposed by the prosecutorial forces of the state. Consequently, the summary judgment evidence fails to establish that adversary judicial proceedings had been initiated against Rothgery during his magistrate appearance.

Rothgery raises several arguments against this conclusion. First, he contends that *McGee*'s holding on prosecutorial involvement is not good law, as the Supreme Court has twice found adversary judicial proceedings to have been initiated without mentioning whether prosecutors were involved. *See Michigan v. Jackson,* 475 U.S. 625, 629 n. 3, 106 S.Ct. 1404, 89 L.Ed.2d 631 (1986); *Brewer v. Williams,* 430 U.S. 387, 399, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977). However, neither case addressed the issue of prosecutorial involvement, much less the relevance of prosecutorial involvement under Texas law. Further, both cases involved a defendant who was arraigned on an arrest warrant, and an arraignment is one of the specific examples given in *Kirby* of pretrial events that initiate adversary judicial proceedings. Although Rothgery argues that the arraignment in *Jackson* was functionally no different than his appearance here, the state supreme court opinion preceding *Jackson*

establishes that the prosecutor's office approved and issued the complaints and warrants that led to the arraignment. *See People v. Bladel,* 421 Mich. 39, 365 N.W.2d 56, 71-72 (1984). And while the extent of prosecutorial involvement in *Brewer* was unaddressed, it does not appear that the state contested that adversary judicial proceedings had begun or otherwise raised the issue. *See Brewer,* 430 U.S. at 399, 97 S.Ct. 1232 ("The State does not contend otherwise."). At most, the opinions are neutral on the point, which is simply not enough for us to ignore our binding authority.[8]

Rothgery also argues that *McGee* is inapplicable here, as the appearance before the magistrate in *McGee* only involved the recitation of statutory warnings, whereas Rothgery's appearance included statutory warnings and a probable cause determination that was based on a police officer's affidavit. Rothgery

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[8] According to Rothgery, *United States v. Gouveia* also affirmed that prosecutorial involvement is unnecessary because it used the word "or" when observing that it had "extended an accused's right to counsel to certain 'critical' pretrial proceedings . . . recognizing that at those proceedings, 'the accused [is] confronted, just as at trial, by the procedural system, or by his expert adversary, or by both.'" 467 U.S. 180, 189, 104 S.Ct. 2292, 81 L.Ed.2d 146 (1984) (citing *United States v. Wade,* 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967), and quoting *United States v. Ash,* 413 U.S. 300, 310, 93 S.Ct. 2568, 37 L.Ed.2d 619 (1973)) (citations omitted). But in that passage the Court was discussing the applicability of the right to counsel at critical stages of the prosecution, not the specific question of when adversary judicial proceedings are initiated.

contends that the affidavit, which related the events underlying the arrest and stated that the officer "charge[d]" that Rothgery committed the offense of being a felon in possession of a firearm, constituted a "complaint" or an otherwise formal charge that initiated adversarial proceedings.[9]

While only an indictment or information can formally charge a felony under Texas law,[10] *see Teal v. State,* No. PD-0689-06, 2007 WL 676221, at *2 (Tex.Crim.App. Mar. 7, 2007); *see also* TEX. CONST. art. I, § 10; TEX.CODE CRIM. PROC. ANN. arts. 21.01, 21.20; GEORGE E. DIX & ROBERT O. DAWSON, 41 TEXAS PRACTICE: CRIMINAL PRACTICE AND PROCEDURE § 20.01, at 513 (2d ed.2001), complaints play a role in felony cases as well. Defined as "[t]he affidavit made before the magistrate or district or county attorney ... charg[ing] the commission of an

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[9] Additionally, Rothgery asserts that his appearance before the magistrate commenced the prosecution because a magistrate has exclusive jurisdiction over a defendant's case upon the filing of a felony complaint until superseded by indictment. *See Ex parte Clear,* 573 S.W.2d 224, 229 (Tex.Crim.App.1978). Even assuming that the affidavit in this case served the same function as the complaint in *Clear,* we fail to see how a magistrate's jurisdiction over preliminary matters alone signals the initiation of adversary proceedings when prosecutors are unaware of and uninvolved in the proceedings. Indeed, *Clear* itself involved a complaint that was sworn before a prosecutor and filed by the prosecutor with the magistrate. *Id.* at 225-26.

[10] Complaints may serve to formally charge a misdemeanor offense in justice and municipal courts. *Huynh v. State,* 901 S.W.2d 480, 481 n. 3 (Tex.Crim.App.1995).

offense," TEX.CODE CRIM. PROC. ANN. art. 15.04, a complaint under Article 15.04 of the Texas Code of Criminal Procedure may serve both as a basis for a probable cause finding for an arrest warrant, *see Huynh v. State,* 901 S.W.2d 480, 481 n. 3 (Tex.Crim.App.1995); *Lowery v. State,* 499 S.W.2d 160, 163 (Tex.Crim.App.1973), and "as a basis for the issuance of an information or the commencement of the indictment process," *State v. Boseman,* 830 S.W.2d 588, 590 n. 3 (Tex.Crim.App.1992); *see also* DIX & DAWSON, 41 TEXAS PRACTICE: CRIMINAL PRACTICE AND PROCEDURE § 19.01, at 473 ("As a matter of local practice, . . . complaints may be routinely filed in felony prosecutions and may reflect prosecutors' decisions to pursue formal felony charges in the particular cases."). Because "the process of prosecution is usually initiated by the filing of a criminal 'complaint'" serving that latter function, *Boseman,* 830 S.W.2d at 590 n. 3, our court and the Texas Court of Criminal Appeals[11] have construed felony complaints to be sufficient to initiate adversary judicial proceedings.[12] *See, e.g., Felder v. McCotter,*

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[11] While state case law is not binding on our court with regard to the applicability of the Sixth Amendment to state procedures, state cases are nonetheless useful for determining the nature of certain state procedures.

[12] Despite Rothgery's claim that *Nehman v. State,* 721 S.W.2d 319, 322 (Tex.Crim.App.1986) (en banc), holds that the combination of a probable cause determination and an Article 15.17 warnings appearance initiates adversary judicial proceedings, the Texas Court of Criminal Appeals later observed that *Nehman*'s holding was based on the presence of "unspecified

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765 F.2d 1245, 1247-48 (5th Cir.1985), *abrogated on other grounds by Patterson v. Illinois,* 487 U.S. 285, 295-96 & n. 8, 108 S.Ct. 2389, 101 L.Ed.2d 261 (1988); *Forte v. State,* 707 S.W.2d 89, 92 (Tex.Crim.App.1986); *Barnhill v. State,* 657 S.W.2d 131, 132 (Tex.Crim.App.1983).

However, none of those cases details the circumstances involved in the filing of the dispositive complaint or addresses an affidavit that was filed after a warrantless arrest to support a magistrate's probable cause inquiry at an Article 15.17 warnings appearance. In fact, in similar circumstances involving a warrantless arrest, a felony complaint, and a magistrate's probable cause determination at an Article 15.17 warnings appearance, the Texas Court of Criminal Appeals chose not to decide whether the complaint initiated adversary judicial proceedings, which indicates that the relationship between a complaint and the commencement of a prosecution in Texas is less clear than Rothgery claims.[13] *See Green*

'charges.' " *Green v. State,* 872 S.W.2d 717, 720 (Tex.Crim.App.1994); *Nehman,* 721 S.W.2d at 323 n. 2. At the very least, we must assume that *Nehman* involved a felony complaint.

[13] *Green v. State* involved a Sixth Amendment claim in the context of an arrest without a warrant, the filing of a "felony complaint" with a notation indicating the setting of bail, and an appearance before a magistrate for Article 15.17 warnings and a probable cause determination. 872 S.W.2d at 718. After discussing the indeterminacy of Texas law on the question of which procedures serve to initiate adversary judicial proceedings and noting the cases that have held that the filing of a complaint serves that function, the court stated: "We need not here decide

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v. State, 872 S.W.2d 717, 720 (Tex.Crim.App.1994). As complaints may be used for different purposes, we simply cannot assume that the affidavit filed in this case was the same type of complaint addressed in the cases cited by Rothgery or that it served the same function as those complaints.

Consequently, we are reluctant to rely on the formalistic question of whether the affidavit here would be considered a "complaint" or its functional equivalent under Texas case law and Article 15.04 of the Texas Code of Criminal Procedures – a question to which the answer is itself uncertain.[14] Instead, we must look to the specific circumstances of this case and the nature of the affidavit filed at Rothgery's

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when adversary judicial proceedings commence. For even if the felony complaint was sufficient to mark the initiation of adversary judicial proceedings, . . . nothing occurred at appellant's [hearing] that would render it a 'critical stage' of the prosecution against him." *Id.* at 720.

[14] As Gillespie County points out, Article 15.04 falls within the "Arrest Under Warrant" chapter of the Texas Code of Criminal Procedure, indicating that it may only apply to affidavits offered in support of an arrest warrant. Additionally, the provision refers to "[*t*]*he* affidavit" made before the magistrate or prosecutor, TEX.CODE CRIM. PROC. ANN. art. 15.04 (emphasis added), and its use of the definite article "the" indicates that its scope may be limited to affidavits detailed elsewhere in the code. The code does not explicitly provide for an affidavit offered at a probable cause hearing for a warrantless arrestee.

In practice, however, we cannot say that Texas courts would not consider a post-warrantless-arrest affidavit of probable cause to be an Article 15.04 complaint or its functional equivalent.

appearance before the magistrate. And the summary judgment evidence, considered in the light most favorable to Rothgery, fails to establish that adversary judicial proceedings were commenced by the affidavit in this case.

The affidavit itself indicates that it was filed for the sole purpose of establishing probable cause, as it was titled "Affidavit of Probable Cause," it primarily consisted of the officer's account of the events and the alleged offense, and the portion of the affidavit signed by the magistrate illustrates that the magistrate relied on the officer's account to "determine[] that probable cause existed for the arrest." The inquiry and its timing shortly after arrest were thus consistent with the probable cause determination required by *Gerstein v. Pugh,* 420 U.S. 103, 114, 95 S.Ct. 354, 43 L.Ed.2d 54 (1975),[15] and *County of Riverside v. McLaughlin,* 500 U.S. 44, 56, 111 S.Ct. 1661, 114 L.Ed.2d 49 (1991), for a person arrested without a warrant. And another form signed by the magistrate to memorialize the warnings given to Rothgery indicated that charges "will be filed" in the district court, not that they were being filed concurrently with the magistrate.

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[15] The Court in *Gerstein* also recognized that such probable cause determinations typically are non-adversarial in nature and do not constitute "critical stages" requiring counsel. 420 U.S. at 120-22, 95 S.Ct. 854.

The only aspect of the probable cause affidavit that even arguably favors Rothgery's argument is its use of the word "charge" in the introductory language to the officer's identification of the offense for which he arrested Rothgery. Yet even as a complaint, the affidavit would be insufficient to formally charge Rothgery with the felony, and there is no basis to conclude that the use of the word "charge" was, or could have been, anything but informal.[16] *Cf. McGee*, 625 F.2d at 1208 (referring to the prosecutor's lack of awareness of "the charges" in finding that adversary judicial proceedings had not initiated).

Most significantly, the summary judgment evidence reflects no prosecutorial knowledge of or involvement in the arrest and magistrate appearance, and Rothgery provides no reason to believe that the officer alone was empowered to commit the state to prosecute Rothgery. Indeed, it took prosecutors roughly six months after the arrest to seek an indictment against Rothgery. Without any evidence to indicate that the affidavit actually served to initiate the prosecution at the time of Rothgery's magistrate appearance, we conclude that the filing of the affidavit was part of the investigatory process, serving solely to validate the arrest without committing the state to prosecute.

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[16] For similar reasons, we also do not find the use of the word "charged" on Rothgery's bond form persuasive.

IV. CONCLUSION

For the foregoing reasons, we AFFIRM the district court's order granting summary judgment to Gillespie County.

APPENDIX B

413 F.Supp.2d 806

United States District,W.D. Texas, Austin Division.
Walter Allen ROTHGERY, Plaintiff,
v.
GILLESPIE COUNTY, TEXAS, Defendant.
No. A-04-CA-456LY.

Feb. 2, 2006.

William Christian, Graves, Dougherty, Hearon & Moody, Andrea M. Marsh, Director, Texas Fair Defense Project, Austin, TX, for Walter Allen Rothgery, Plaintiff.

Charles Straith Frigerio, Attorney at Law, San Antonio, Hector Xavier Saenz, Law Ofcs. Of Chas. S Frigerio, for Gillespie County, TX, Defendant.

YEAKEL, District Judge.

Before the Court are Defendant Gillespie County's Motion for Summary Judgment filed July 18, 2005 (Doc. # 28); Plaintiff's Response in Opposition to Defendant's Motion for Summary Judgment filed August 8, 2005 (Doc. # 32); Plaintiff's Appendix of Summary Judgement Evidence filed August 8, 2005 (Doc. # 33); and Defendant Gillespie County's Reply to Plaintiff's Response to Defendant's Motion for Summary Judgment filed August 19, 2005 (Doc. # 29). The Court heard argument on the motion on November 18, 2005. Having considered the motion, response, and reply, as well as argument of counsel,

summary-judgment proof presented, and applicable case law, the Court will grant the summary-judgment motion for the following reasons.

I. Background

On July 15, 2002, officers of the Fredericksburg, Texas Police Department arrested Plaintiff Walter Allen Rothgery without a warrant for unlawfully carrying a firearm by a felon, a third-degree felony under Texas law.[1] Rothgery was taken to the Gillespie County jail for booking. Rothgery states he requested, in writing, appointment of counsel, because he could not afford to hire an attorney to defend him. This written request is not a part of the summary-judgment proof submitted to this Court.

The next morning, July 16, 2002, Rothgery appeared before Judge Carl Schoessow, Justice of the Peace, Precinct # 2, Gillespie County.[2] At that time,

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[1] At the summary-judgment stage, this Court is required to believe the evidence of the nonmovant and to draw all justifiable inferences in the nonmovant's favor. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The Court's factual recitation, therefore, reflects Rothgery's version of the facts.

[2] Because Rothgery was arrested without a warrant, Texas law requires that he be presented to a magistrate within forty-eight hours of his arrest. *See* TEX CODE CRIM. PROC. ANN. art. 14.06(a) (West Supp.2005). Presentation to the magistrate is required, in part, so that the magistrate can inform a person arrested of the accusation against him and of any affidavit filed therewith, of his right to retain counsel, of his right to remain

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Judge Schoessow presented Rothgery with a form "Warning by Magistrate (Setting Bail & Right to Attorney) State of Texas, County of Gillespie," which Rothgery submitted as part of his summary-judgment proof. The form reflects that Judge Schoessow informed Rothgery that Rothgery was accused of the criminal offense of unlawful possession of a firearm by a felon, but that formal charges had not yet been filed against Rothgery, and that Judge Schoessow set Rothgery's bond at $5,000. Additionally, the form reflects that Judge Schoessow informed Rothgery of his right to appointed counsel, if Rothgery could not afford counsel, and that Rothgery waived his right to counsel "at that time."[3]

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silent, of his right to have an attorney present during any interview with peace officers or attorneys representing the state, of his right to terminate the interview at any time, of his right to have an examining trial, and of his right to request the appointment of counsel if the person cannot afford counsel. *See* TEX CODE CRIM. PROC. ANN. art. 15.17(a) (West Supp.2005). The magistrate is further required to inform the person arrested of the procedures for requesting appointment of counsel and that he is not required to make a statement and that any statement made by him may be used against him. *See id.* These sections of the Texas Code of Criminal Procedure were amended after Rothgery's arrest. Because the amendments did not materially alter the sections as they existed then, the current versions are cited for simplicity.

[3] The phrase "at that time" is underlined on the form. Rothgery testified in his deposition that this phrase was underlined because, when Rothgery asked Judge Schoessow about the status of his July 15, 2002 request for appointment of counsel. Judge Schoessow said that Rothgery would have to waive his right to an attorney for purposes of the July 16, 2002

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As part of his summary-judgment proof, Rothgery also submitted the Affidavit of Probable Cause sworn to by the arresting officer on July 15, 2002. This affidavit purports to set forth facts personally observed by the arresting officer regarding Rothgery's actions on July 15, 2002, and charges that Rothgery committed the offense of unlawful possession of a firearm by a felon, a third degree felony. *See* TEX. PENAL CODE ANN. § 46.04 (West Supp.2005).[4] The affidavit further reflects that on July 16, 2002, Judge Schoessow examined the affidavit and determined that probable cause existed for the arrest of Rothgery.

After Rothgery posted bail, he continued to inquire about the status of his July 15, 2002 request for appointment of counsel. After county employees informed him that they could not locate his July 15, 2002 request for counsel, Rothgery completed a second written request for appointment of counsel on July 24, 2002. Rothgery caused the request to be notarized and submitted to jail employees. No

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appearance, if Rothgery wanted to have bail set at that time. According to Rothgery, Judge Schoessow told him that he would have to wait in jail until an appointment was made, if Rothgery wanted an attorney appointed for the bail determination. Rothgery further testified that he agreed to waive his right to counsel for purposes of that proceeding only based upon Judge Schoessow's statements, and that Judge Schoessow underlined the phrase "at that time" to reflect this limited waiver.

[4] This section of the Texas Penal Code was amended after Rothgery's arrest. Because the amendment did not materially alter the section as it existed then, the current version is cited for simplicity.

attorney was appointed for him based on the July 24, 2002 request.

As is true of the July 15, 2002 request, this second request is not a part of the summary-judgment proof before this Court. Rothgery's summary-judgment proof does include the notary log of Barbara Crenwegle, the administrative assistant to the Gillespie County Judge and Commissioners. Crenwegle's notary log reflects that Crenwegle notarized a request for appointment of an attorney and an affidavit in support of an application for appointment of an attorney on July 24, 2002, for "Walter A. Rothgery."

From July 2002 until January 2003, Rothgery claims that he repeatedly contacted employees of Gillespie County to inquire about the status of his appointment of counsel. Rothgery testified in his deposition that he was consistently told that no appointment had been made.

On January 17, 2003, six months after Rothgery's arrest, a Gillespie County grand jury returned an indictment against Rothgery for the state felony offense of unlawfully carrying a firearm by a felon. Rothgery's bond was increased to $15,000, and he was rearrested on January 18, 2003. Rothgery was again brought before Judge Schoessow on January 19, 2003.[5] When he appeared before Judge Schoessow,

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[5] Rothgery testified in his deposition that he thought he appeared before Judge Schoessow on January 19, 2003, but that

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Rothgery inquired about the status of his last request for appointment of counsel, the July 24, 2002 written request. Rothgery states that Judge Schoessow speculated that Rothgery had not been appointed an attorney because he "didn't deserve one." Rothgery further testified in his deposition that, as of January 19, 2003, there was no record of his submitting the previous two requests for appointment of counsel. Rothgery claims that he submitted a third form requesting counsel on January 19, 2003. Like the others, this request is not in the summary-judgment record before this Court.

Three days later, and still with no appointed attorney, Rothgery was transferred to the Comanche County jail due to overcrowding in the Gillespie County jail. Rothgery asked Comanche County jail employees about the status of his request for appointment of counsel, and was told that they knew nothing of such request. On January 23, 2003, Rothgery completed a fourth written request, and employees at the Comanche County jail faxed the request to Gillespie County. Based on this request, State District Judge Stephen Ables immediately appointed counsel to represent Rothgery. The January 23, 2003

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he was unsure. As part of its summary-judgment proof, Gillespie County submitted the second "Warning by Magistrate (Setting Bail & Right to Attorney) State of Texas, County of Gillespie" form issued to Rothgery, and this form reflects that Rothgery appeared before Judge Schoessow on January 19, 2003.

request is part of the summary-judgment record in this case.

Rothgery's appointed counsel expeditiously obtained records concerning the alleged underlying offense, which reflected that Rothgery was not a convicted felon. On that basis, the Gillespie County District Attorney moved to dismiss the indictment. Judge Ables granted the motion and dismissed the indictment against Rothgery on April 30, 2003.

On July 15, 2004, Rothgery filed this action under Title 42, United States Code, Section 1983, the federal Civil Rights Act, against Gillespie County. *See*42 U.S.C. § 1983. Rothgery alleges that Gillespie County's policies or customs regarding appointment of counsel for indigent defendants violate the Sixth and Fourteenth Amendments to the United States Constitution. Rothgery does not, however, complain about Gillespie County's written policies and procedures concerning appointment of counsel for indigent defendants. Rather, Rothgery complains about unwritten policies and customs concerning appointment of counsel for indigent defendants that he alleges both the county and state courts follow in Gillespie County.[6]

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[6] As part of his summary-judgment proof, Rothgery submitted Gillespie County's written policies, "Gillespie County Plan and Standing Rules and Order for Procedures for Timely and Fair Appointment of Counsel for Indigent Accused Persons in Gillespie County, Texas." Since these written policies are not at issue in this action, this Court expresses no opinion of them.

Specifically, Rothgery alleges that Gillespie County follows a policy, practice, and custom that denies access to appointed counsel to a person charged with a felony, if that person is released from jail on bond, regardless of the person's financial status. Alternatively, Rothgery alleges that Gillespie County follows a policy, practice, and custom that denies access to appointed counsel to a person charged with a felony, but not yet indicted, if that person is out of custody on bond at the time of his request for counsel, regardless of the person's financial status. Rothgery further alleges that Gillespie County follows a policy, practice, and custom that involves failure to adequately train, supervise, and monitor county employees to whom the responsibility for preliminary processing of requests for appointed counsel has been delegated; thus creating an unreasonable risk that applications for appointed counsel will not be recorded and will not be ruled upon in a timely manner. Lastly, Rothgery alleges that Gillespie County follows a policy, practice, and custom that involves failure to adequately monitor appointed counsel, creating an unreasonable risk that attorneys appointed to represent indigent criminal defendants will not promptly contact those defendants, thereby denying meaningful access to counsel. Seeking monetary damages against Gillespie County, Rothgery claims these policies and customs injured him because, had be been timely appointed counsel in July 2002, the charges against him would have been resolved before he was indicted, rearrested, incarcerated, and subjected to increased bail in January 2003.

Gillespie County moves for summary judgment on Rothgery's entire action, arguing that there is no constitutional duty to appoint counsel prior to the initiation of adversary judicial proceedings. Gillespie County contends that the July 16, 2002 appearance before Judge Schoessow was not an adversary judicial proceeding because an appearance before a magistrate for statutory warnings does not involve counsel for the state and does not constitute a formal charge. Gillespie County argues that adversary judicial proceedings, sufficient to trigger Rothgery's Sixth Amendment right to counsel, were not initiated until after Rothgery was indicted and he made his first post-indictment court appearance. Thus, Gillespie County argues that the failure to appoint counsel for Rothgery from July 16, 2002, through January 23, 2003, did not violate Rothgery's Sixth Amendment right to counsel.

To the contrary, Rothgery argues that adversary proceedings were initiated against him on July 16, 2002, when he was charged by criminal complaint under Texas law. Rothgery contends that formal charges were filed against him under Texas law on July 16, 2002, when the arresting officer presented Judge Schoessow with the probable-cause affidavit. Gillespie County replies that no adversary judicial proceedings had begun on July 16, 2002, because the probable-cause affidavit is not a felony complaint under Texas law, and, even if it were, a felony complaint may be insufficient to trigger to the Sixth Amendment right to appointed counsel.

As discussed fully below, this Court concludes that neither the presentation of the probable-cause affidavit to Judge Schoessow nor Rothgery's appearance before Judge Schoessow on July 16, 2002, initiated adversary judicial proceedings against Rothgery. Thus, Rothgery's Sixth Amendment right to counsel did not attach on July 16, 2002, and Gillespie County did not violate Rothgery's Sixth and Fourteenth Amendment rights by failing to appoint counsel from July 16, 2002, through January 23, 2003.[7]

II. Summary-Judgment Standard

Summary judgment should be granted if the record, taken as a whole, "together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c); *New York Life Ins. Co. v. Travelers Ins. Co.*,

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[7] Gillespie County also moves for summary judgment on the grounds that it has no duty to appoint counsel or to establish plans or procedures for appointing counsel. Because the resolution of the Sixth Amendment issue is determinative of the entire action, this Court need not address Gillespie County's other grounds for summary judgment. Likewise, because the Court determines that Rothgery's Sixth Amendment right to counsel did not attach on July 16, 2002, the Court need not address Rothgery's allegations in his complaint that Gillespie County follows a policy, practice, and custom that involves failure to adequately train, supervise, and monitor county employees to whom the responsibility for preliminary processing of requests for appointed counsel has been delegated and failure to adequately monitor appointed counsel.

92 F.3d 336, 338 (5th Cir.1996). The Supreme Court has interpreted the plain language of Rule 56(c) to mandate "the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). A party moving for summary judgment "must 'demonstrate the absence of a genuine issue of material fact,' but need not negate the elements of the nonmovant's case." *Little v. Liquid Air Corp.,* 37 F.3d 1069, 1075 (5th Cir.1994) (*en banc*) (quoting *Celotex,* 477 U.S. at 323, 106 S.Ct. 2548). If the moving party "fails to meet this initial burden, the motion must be denied, regardless of the nonmovant's response." *Little,* 37 F.3d at 1075.

If the moving party meets this burden, Rule 56(c) requires the nonmovant to go beyond the pleadings and show by affidavits, depositions, answers to interrogatories, admissions on file, or other admissible evidence that specific facts exist over which there is a genuine issue for trial. *See Wallace v. Texas Tech Univ.,* 80 F.3d 1042, 1047 (5th Cir.1996). The nonmovant's burden may not be satisfied by conclusory allegations, unsubstantiated assertions, metaphysical doubt as to the facts, or a scintilla of evidence. *See Wallace,* 80 F.3d at 1047; *Little,* 37 F.3d at 1075. Factual controversies are to be resolved in favor of the nonmovant, "but only when there is an actual

controversy, that is, when both parties have submitted evidence of contradictory facts." *Little,* 37 F.3d at 1075. The court will not, "in the absence of any proof, assume that the nonmoving party could or would prove the necessary facts." *Little,* 37 F.3d at 1075.

In order to determine whether or not summary judgment should be granted, an examination of the substantive law is essential. Substantive law will identify which facts are material in that "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249-51, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

III. Analysis

In pertinent part, the Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI. The purpose of the Sixth Amendment is to protect "the unaided layman at critical confrontations with his adversary." *U.S. v. Gouveia,* 467 U.S. 180, 189, 104 S.Ct. 2292, 81 L.Ed.2d 146 (1984). The Sixth Amendment right to counsel attaches only at or after the initiation of adversary judicial proceedings against the defendant. *See Gouveia,* 467 U.S. at 187, 104 S.Ct. 2292; *Kirby v. Illinois,* 406 U.S. 682, 688, 92 S.Ct. 1877, 32 L.Ed.2d 411 (1972). The initiation of adversary judicial criminal proceedings may be by

way of formal charge, preliminary hearing, indictment, information, or arraignment. *See Kirby,* 406 U.S. at 689, 92 S.Ct. 1877. Federal courts look to state law in evaluating whether adversary judicial proceedings have been initiated. *See Moore v. Illinois,* 434 U.S. 220, 228, 98 S.Ct. 458, 54 L.Ed.2d 424 (1977).

The Texas Court of Criminal Appeals has not set forth a "bright-line rule" to determine when adversary judicial proceedings begin. *See Hidalgo v. State,* 983 S.W.2d 746, 752 (Tex.Crim.App.1999). In fact, the "caselaw is somewhat indeterminate on the question of what events may serve to initiate adversary judicial proceedings for Sixth Amendment purposes." *Green v. State,* 872 S.W.2d 717, 720 (Tex.Crim.App.1994). Rather than following a bright-line rule as to when adversary judicial proceedings have begun, Texas courts focus on whether a particular event is a critical stage to which a person's Sixth Amendment right to counsel attaches. *See Hidalgo,* 983 S.W.2d at 752. Generally, Texas courts consider whether "the accused requires aid in coping with legal problems or assistance in meeting his adversary" in determining if an event is a critical stage. *Id.* Although this Court is bound by Texas courts' interpretation of the law governing its proceedings, this Court is not bound by the opinions of Texas courts concerning what constitutes a critical stage of prosecution under the Sixth Amendment. *See Coleman v. Alabama,* 399 U.S. 1, 9, 90 S.Ct. 1999, 26 L.Ed.2d 387

(1970) (rejecting Alabama Court of Appeal's conclusion that preliminary hearing was not critical stage).

The first issue before the Court is whether formal charges were filed against Rothgery on July 16, 2002, that initiated adversary judicial proceedings against him under *Kirby*. Rothgery contends that formal charges were filed against him when the arresting officer presented his Affidavit of Probable Cause to Judge Schoessow.[8] Rothgery argues that the probable-cause affidavit is a complaint under Texas law that initiated adversary judicial proceedings against him.

To support his contention, Rothgery relies on Article 15.04 of the Texas Code of Criminal Procedure, which states that "the affidavit made before the magistrate or district or county attorney is called a 'complaint' if it charges the commission of an offense." TEX. CODE CRIM. PROC. ANN. art. 15.04 (West 2005). Article 15.04 is found in the chapter of the Texas Code of Criminal Procedure titled "Arrest Under Warrant." *See* TEX. CODE CRIM. PROC. Arts. 15.01-15.27 (West 2005 & West Supp.2005). It is undisputed, however, that Rothgery was arrested without a warrant on July 15, 2002.[9] Although there

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[8] It is undisputed that Rothgery had not yet been indicted or charged by information on July 16, 2002. Further, no party suggests that Rothgery was presented for arraignment before Judge Schoessow on July 16, 2002.

[9] Chapter 14 of the Texas Code of Criminal Procedure, titled "Arrest Without Warrant," governs warrantless arrests. *See*

(Continued on following page)

is little case law on the issue, it appears that Texas courts have construed Article 15.04 as applying only to affidavits made in support of arrest warrants. For instance, in *Huynh v. State,* 901 S.W.2d 480, 481 n. 3 (Tex.Crim.App.1995), the court explained that "[a] complaint is a sworn affidavit charging the commission of an offense and serves as the basis for an arrest warrant." Judge Meyers noted in his concurrence in *Green* that

> [i]t is well to remember in this context that the word "complaint" has come to mean at least two different things under Texas law. First, it describes a sworn affidavit upon the basis of which a magistrate may issue a warrant of arrest. Tex.Code Crim. Proc. Ann. arts. 15.03(a)2, 15.04, 15.05. In this sense, it does not refer to a criminal pleading. *Wooldridge v. State,* 653 S.W.2d 811, 814 n. 6 (Tex.Crim.App.1983).

Green, 872 S.W.2d at 731 n. 5 (Meyers, J., concurring). Likewise, one Texas court has explained that an "affidavit supporting an arrest warrant is called a complaint." *Weems v. State,* 167 S.W.3d 350, 355 (Tex.App.-Houston [14th Dist.] 2005, pet ref'd.). Echoing Judge Meyers's statement in his *Green* concurrence, the same court has explained that "[t]he Code of Criminal Procedure uses the term 'complaint' to refer to both the affidavit supporting

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TEX. CODE CRIM. PROC. ANN. arts. 14.01-14.06 (West 2005 & West. Supp.2005).

an application for an arrest warrant and the written document alleging an offense that it sworn to before a prosecutor." *Merritt v. State,* 76 S.W.3d 632, 633 n. 1 (Tex.App.-Houston [14th Dist.] 2002, no pet.) citing TEX. CODE CRIM. PROC. ANN. arts 2.04, 15.04 (West 2005).

No court, however, has expressly held that Article 15.04 applies only to affidavits given in support of arrest warrants. At the same time, the Court has found no case holding, or even discussing the possibility, that Article 15.04 applies to affidavits given in support of a probable-cause determination following a warrantless arrest. Rothgery relies on *Nehman v. State,* 721 S.W.2d 319 (Tex.Crim.App.1986) in support of his argument that formal charges were filed against him on July 16, 2002. The *Nehman* court concluded that adversary judicial proceedings had been initiated by the time the accused's Article 15.17 warnings[10] were given and held the accused's confession inadmissible. *See id.* at 322-23. The *Nehman* court stated that "formal judicial proceedings had been initiated by the time of appellant's Art. 15.17 'warning hearing.'" *Id.* at 323 n. 2. Although the *Nehman* court did not elaborate further on how the "formal judicial proceedings" had been initiated, the opinion reflects that a warrant for appellant's arrest had been issued and that appellant had been advised of his rights under *Miranda v. Arizona,*[11] including his

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[10] *See supra* note 2.

[11] 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

right to counsel, before the Article 15.17 warnings were given. *See id.* at 320. Because Rothgery was not arrested pursuant to a warrant, the Court finds *Nehman* distinguishable. The Court concludes that Article 15.04 is inapplicable to the facts of this case.

Additionally, the Texas Court of Criminal Appeals has observed that Texas law requires prompt probable-cause determinations for individuals arrested without a warrant to satisfy the Fourth Amendment. *See Green,* 872 S.W.2d at 721. Specifically, the *Green* court explained that "[b]ecause appellant was arrested without a warrant, it was necessary under the Fourth Amendment for the State promptly to obtain a probable cause determination 'as a condition of any significant pretrial restraint of liberty.'" *Id.* citing *Gerstein v. Pugh,* 420 U.S. 103, 125, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975). It thus appears to this Court that, under Texas law, the purpose of presenting the probable-cause affidavit to Judge Schoessow on July 16, 2002, was to establish that probable cause existed under the Fourth Amendment for arresting Rothgery without a warrant, not to formally charge him with an offense under Texas law or *Kirby.*

Following Texas jurisprudence, the Court concludes that Article 15.04 does not apply to the probable-cause affidavit presented to Judge Schoessow in support of Rothgery's warrantless arrest. The Court further concludes that the probable-cause affidavit presented to Judge Schoessow on July 16, 2002, is not a complaint under Texas law formally charging

Rothgery with an offense under *Kirby*. Since no formal charges were filed against Rothgery on July 16, 2002, adversary judicial proceedings were not initiated against him at that time, and his Sixth Amendment right to counsel did not attach.

In light of this Court's determination that no formal charges had been filed against Rothgery with the presentation of the probable-cause affidavit to Judge Schoessow, the Court agrees with Gillespie County that Rothgery's appearance before Judge Schoessow on July 16, 2002, did not initiate adversary judicial proceedings under Texas law. On July 16, 2002, pursuant to Article 15.17(a), Judge Schoessow advised Rothgery of his rights, informed him of the crime accused, advised him of the right and procedures for obtaining counsel, determined probable existed for his detention and set bond. *See* TEX CODE CRIM. PROC. ANN. art. 15.17(a). The Texas Court of Criminal Appeals has held that the giving of Article 15.17 warnings does not initiate adversary judicial proceedings. *Wyatt v. State,* 566 S.W.2d 597, 600 (Tex.Crim.App.1978). The *Wyatt* court stated that "[i]t is clear that the form signed and relied upon by appellant is simply an acknowledgment that a magistrate's warning was given pursuant to Article 15.17. . . . We cannot conclude that informing the defendant of the accusation against him constitutes the initiation of adversary criminal procedures." *Id.* Further, the *Green* court observed that "[o]ther than its Article 15.17 aspect, the PIA [preliminary initial appearance], *per se,* is not a requirement of state

law." *Green,* 872 S.W.2d at 722. The *Green* court explained that nothing that occurred at the defendant's preliminary initial appearance "required the aid of counsel to cope with any legal problem or assist in meeting the prosecutorial adversary." *Id.* at 721.[12] Additionally, the *Green* court stated, in *dicta,* that the possibility that an attorney could contest bail "does not convert the PIA [preliminary initial appearance] into a critical stage." *Green,* 872 S.W.2d at 722. Although not bound by the state court's critical-stage determination, the Court is persuaded that the determination is reflective of the Texas Court of Criminal Appeals' view that adversary judicial proceedings are not initiated by an appearance before a magistrate for Article 15.17 warnings and the setting of bail.

The Court concludes that no adversary judicial proceedings were initiated against Rothgery under Texas law on July 16, 2002, when Rothgery appeared before Judge Schoessow. Gillespie County is correct

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[12] In *Green,* the defendant was arrested without a warrant, charged by felony complaint the day after his arrest, and subsequently presented to a magistrate pursuant to Article 15.17. Despite the State's invitation, the Texas Court of Criminal Appeals declined to hold that adversary judicial proceedings can only be initiated in a felony prosecution by the filing of an indictment. *See Green,* 872 S.W.2d at 720. Rather, the court held that an appearance before a magistrate under Article 15.17 and a probable-cause determination, following a warrantless arrest, is not a critical stage, even if adversary judicial proceedings have been initiated. *See id.*

that Rothgery's Sixth Amendment right to counsel did not attach at that time.

This Court's holding that neither the presentation of the probable-cause affidavit to Judge Schoessow or Rothgery's appearance before Judge Schoessow on July 16, 2002 initiated adversary judicial proceedings against Rothgery under Texas law is consistent with Supreme Court and Fifth Circuit precedent. The Supreme Court has repeatedly stated that "the initiation of judicial criminal proceedings is far from a mere formalism." *Kirby,* 406 U.S. at 689, 92 S.Ct. 1877. Rather, the initiation of judicial criminal proceedings

> is the starting point of our whole system of adversary criminal justice. For it is only then that the government has committed itself to prosecute, and only then that the adverse positions of government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law. It is this point, therefore, that marks the commencement of the 'criminal prosecutions' to which alone the explicit guarantees of the Sixth Amendment are applicable.

Id. at 689-90, 92 S.Ct. 1877.

Although the Supreme Court has extended the Sixth Amendment's right to counsel to certain "critical stages" of criminal proceedings, it has done so in limited circumstances. *See Gouveia,* 467 U.S. at 189,

104 S.Ct. 2292. In the narrow instances where the Supreme Court has recognized that an accused Sixth's Amendment right attaches at a pretrial proceeding,

> the accused [is] confronted, just as at trial, by the procedural system, or by his expert adversary, or by both, *United States v. Ash, supra,* 413 U.S. at 310, 93 S.Ct. at 2574, in a situation where the results of the confrontation "might well settle the accused's fate and reduce the trial itself to a mere formality." *United States v. Wade,* supra, 388 U.S. at 224, 87 S.Ct. at 1930.

Gouveia, 467 U.S. at 188-89, 104 S.Ct. 2292. Accordingly, the Sixth Amendment right to counsel can attach at pre-indictment preliminary hearings, if an accused is confronted with prosecutorial forces and witnesses against him. *See Coleman,* 399 U.S. at 10, 90 S.Ct. 1999. In such instances, "the guiding hand of counsel at the preliminary hearing is essential to protect the indigent accused against an erroneous or improper prosecution." *Id.* at 9, 90 S.Ct. 1999.

The Fifth Circuit has held that an adversary criminal proceeding has not begun where the prosecution officers are unaware of either the charges or the arrest. *See McGee v. Estelle,* 625 F.2d 1206, 1208 (5th Cir.1980). The Fifth Circuit reasoned that an appearance before a magistrate for statutory warnings does not trigger the adversary process under Texas law because it does not involve counsel for the state and is not a formal charging. *See id.* at 1209.

Rather, such an appearance "is for the purpose of complying with the requirements set forth in *Miranda v. Arizona*." *Id.*

The Court notes that the summary-judgment record does not reflect any involvement of the Gillespie County District Attorney's Office on July 16, 2002. There is no summary-judgment proof that a prosecutor from the Gillespie County District Attorney's Office was present at Rothgery's July 16, 2002, appearance before Judge Schoessow or involved in any way in the probable-cause determination. To the contrary, the summary-judgment proof demonstrates that no decision had been made by the Gillespie County District Attorney's Office on July 16, 2002, to prosecute Rothgery for the criminal offense of unlawfully carrying a firearm by a felon. As the warnings form that Judge Schoessow presented to Rothgery reflects, no charges had been filed against Rothgery at that time. Rather, the form reflects that charges "will be filed" in Gillespie County district court.

For this Court to find that Rothgery's Sixth Amendment right to counsel attached on July 16, 2002, the Court would have to conclude that a warrantless arrest plus Article 15.17 warnings and a subsequent probable-cause determination, without involvement by prosecutorial forces, is sufficient to trigger the Sixth Amendment right to counsel. Such a holding would violate Supreme Court precedent equating adversary judicial proceedings with criminal prosecutions, which necessarily implies involvement, or, at a minimum, awareness of the prosecutor. *See*

McNeil v. Wisconsin, 501 U.S. 171, 175, 111 S.Ct. 2204, 115 L.Ed.2d 158 (1991) (Sixth Amendment right to counsel "does not attach until a prosecution is commenced, that is, at or after the initiation of adversary judicial criminal proceedings – whether by way of formal charge, preliminary hearing, indictment, information, or arraignment") quoted in *Texas v. Cobb,* 532 U.S. 162, 167-68, 121 S.Ct. 1335, 149 L.Ed.2d 321 (2001); *Gouveia,* 467 U.S. at 188, 104 S.Ct. 2292 (Sixth Amendment requires existence of both criminal prosecution and accused). Further, such a holding would be dangerously close to violating the clear statement in *Gouveia* that the Sixth Amendment right to counsel does not attach at the time of arrest.[13] *See Gouveia,* 467 U.S. at 190, 104 S.Ct. 2292.

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[13] In explaining that the Sixth Amendment right to counsel does not attach at the time of arrest, then Justice Rehnquist differentiated between the Sixth Amendment rights to counsel and to speedy trial. Although the Sixth Amendment's speedy-trial guarantee may attach before an indictment, and as early as the time of arrest and holding to answer a criminal charge, the Supreme Court had never held that the Sixth Amendment's right to counsel attaches at the time of arrest.

This difference is readily explainable, given the fact that the speedy trial right and the right to counsel protect different interests. While the right to counsel exists to protect the accused during trial-type confrontations with the prosecutor, the speedy trial right exists primarily to protect an individual's liberty interest, "to minimize the possibility of lengthy incarceration prior to trial, to reduce the lesser, but nevertheless substantial, impairment of liberty imposed on an accused while released on bail, and to shorten the disruption of life caused by arrest and the presence of unresolved criminal charges." *United States v. MacDonald, supra,* 456 U.S. at 8, 102 S.Ct. at 1502. *See Barker*

(Continued on following page)

Finally, such a holding would be inconsistent with Texas law regarding initiation of adversary judicial proceedings. *See Green* 872 S.W.2d at 720; *Nehman,* 721 S.W.2d at 323; *Wyatt,* 566 S.W.2d at 600.

In conclusion, the Court finds that no adversary judicial proceedings were initiated on July 16, 2002, under Texas law, either by way of the presentation of the probable cause affidavit to Judge Schoessow or by Rothgery's appearance before Judge Schoessow. Thus, Rothgery's Sixth Amendment right to counsel did not attach on July 16, 2002. The Court concludes that Gillespie County did not violate Rothgery's Sixth Amendment rights by failing to appoint Rothgery counsel from July 16, 2002 until January 23, 2003.[14]

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v. Wingo, 407 U.S. 514, 532-533, 92 S.Ct. 2182, 2192-2193, 33 L.Ed.2d 101 (1972); *United States v. Marion, supra,* 404 U.S. at 320, 92 S.Ct. at 463.

Gouveia, 467 U.S. at 190, 104 S.Ct. 2292.

The distinction between the right to counsel and right to speedy trial further persuades the Court that the July 16, 2002 appearance did not initiate adversary judicial proceedings against Rothgery, as Rothgery was not held "to answer a criminal charge," but, instead, was only informed of the accusation against him.

[14] The Court recognizes that Rothgery testified in his deposition that he requested counsel on January 19, 2003, and that no counsel was appointed based on this request. As previously noted, this request is not included in the summary-judgment proof. Only the January 23, 2003 request, upon which Judge Ables acted immediately is before the Court. Construing, as the Court must, all facts in favor of Rothgery, the Court presumes Rothgery did request counsel on January 19, 2003.

(Continued on following page)

Turning to Rothgery's Fourteenth Amendment allegations, Rothgery alleges that Gillespie County violated his right to due process and to equal protection under the law by denying him access to counsel, in part, by delaying appointment of counsel for six months. The Sixth Amendment's right to counsel applies to the states through the Fourteenth Amendment. *See Gideon v. Wainwright,* 372 U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). A person's Sixth and Fourteenth Amendment right to counsel attaches only at or after the time that adversary judicial proceedings have been initiated against him. *See Kirby* 406 U.S. at 688, 92 S.Ct. 1877. Because this Court has determined that no adversary judicial proceedings were initiated against Rothgery on July 16, 2002, and that his right to counsel under the Sixth Amendment did not attach at that time, Gillespie County did not unconstitutionally deny Rothgery access to counsel. Thus, there is no violation of the Fourteenth Amendment under either the due process or equal protection clauses.

Gillespie County's failure to appoint counsel on January 19, 2003, is, at best, negligence, and not indicative of a policy, practice, or custom to avoid appointing counsel. As soon as Judge Ables was advised of Rothgery's January 23, 2003 request, Judge Ables appointed counsel.

IV. Conclusion

IT IS THEREFORE ORDERED that Defendant Gillespie County's Motion for Summary Judgment (Doc. # 28) is **GRANTED**.

APPENDIX C

Warning by Magistrate (Setting Bail & Right to Attorney) State of Texas, County of Gillespie

This is to certify that I, acting as and in the capacity of a magistrate, in clear language, and in person, did inform:

Name: Walter Allen Rothgery Case Number: _____

1. You are accused of the criminal offense of: unlawful possession of a firearm by a felon which ~~is~~/will be filed in 216th District Court, Gillespie Court.

2. If peace officers or attorneys representing the state question you, you have the right to have a lawyer present. You have the right to talk to your lawyer *before* being questioned, to have your lawyer with you *while* being questioned and the right to *stop the questioning* at any time. If you cannot afford to hire a lawyer, you have the right to have one appointed.

3. You have the right to remain silent and are not required to make a statement, either oral or written. Any statement you make can be used as evidence against you in court.

4. In felony cases, you have the right to an examining trial.

YOUR BOND IS SET AT: 5,000.00 (Cash/Surety)/ ~~(Personal Bond)~~/(Bond ~~Not Determined~~)

I have further (in clear language understood by the accused) informed the accused:

1. If you cannot pay for a lawyer, you can request one *right now*.

2. You would have to fill out a sworn statement about your work, what you own, your expenses and family.

3. If you need help filling out the form, someone will help you.

4. These are the time frames. Your request will be sent to the judge of your case within 24 hours. He/she has 3 days to decide if you get a court appointed lawyer. If a lawyer is appointed, s/he will try to contact you by the end of the next first working day.

I, the magistrate in this case, hereby certify that:

1. The law enforcement agency having custody of the named accused has brought the accused before this magistrate not later than 48 hours after arrest.

2. I have informed the accused of his/her right to request appointment of an attorney, if indigent, and the procedures for requesting appointment of an attorney.

3. If the accused does not speak and/or understand the English language or is deaf, I have informed the accused in a manner consistent with the Tx CCP Art. 38.30 and 38.31.

4. I have ensured that all reasonable assistance in completing the necessary forms for the requesting appointment of an attorney has been provided.

5. A record of the magistrate's advising the accused of the right to appointed attorney has been prepared in accordance with the law and such record consists of this document signed by me as Magistrate, a copy of which was provided to the accused person.

I, the magistrate in this case, do certify that I am the duly elected or appointed Justice of the Peace, ___ Precinct #1/ ✓ Precinct #2/ ___ Fredericksburg Municipal Judge in Gillespie County, Texas and further certify that:

(✓) The accused has announced the intention to *waive right to counsel* at this time WR (initials)

( ) The accused has announced s/he is *not indigent* and does not wish appointment of attorney at this time. _____ (initials)

( ) The accused is being held on a *misdemeanor* accusation and has claimed s/he is indigent and has requested court appointed counsel. The Affidavit of Indigence and Request for Attorney is to be referred within 24 hours to: the Gillespie County Judge for determination of indigence and if appropriate, appointment of attorney in accordance with the plan approved by the District Judge of Gillespie County, TX/ _____.

( ) The accused is being held on a *felony* accusation and has claimed s/he is indigent and has requested court appointed counsel. The Affidavit of Indigence and Request for Attorney is to be referred within 24 hours to: the District Judge of Gillespie County, TX for determination of indigence and, if appropriate, appointment of attorney in accordance with the plan approved by the District Judge of Gillespie County, TX/ _____.

x /s/ Walter Rothgery
PERSON WARNED

/s/ Carl E. Schoessow
Magistrate, Gillespie County, Texas

Date and Time: July 16, 2002 at 8:30 AM

Witness: /s/ Ray Rodriguez

FILED
NOV 13 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 07-440

IN THE

Supreme Court of the United States

WALTER ALLEN ROTHGERY,

Petitioner,

v.

GILLESPIE COUNTY, TEXAS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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In the decision below, the Fifth Circuit held that petitioner's Sixth Amendment right to counsel did not attach, even after he was arrested, brought before a judge who found probable cause that he had committed a crime, and bound over by that judge to custody, simply because prosecutors were not involved in the initial court appearance. The petition for a writ of certiorari demonstrated that the Fifth Circuit's decision conflicts with the holdings of other federal courts of appeals and state courts of last resort; reflects a fundamental confusion regarding the meaning of this Court's Sixth Amendment jurisprudence; and permits indigent defendants to be incarcerated for long periods without access to counsel. The result in this case was that petitioner—who was legally incapable of committing the crime of which he was accused—was jailed for weeks, unable to free himself, until his belatedly appointed lawyer proved his innocence.

Gillespie County does not defend the Fifth Circuit's prosecutorial involvement test or attempt to demonstrate that it is consistent with the analysis employed by this Court or other courts. Rather, its principal response is that the Fifth Circuit's decision does not conflict with the other decisions discussed in the petition because, unlike the defendants in those cases, Rothgery was not "arraigned" at his initial court appearance. That contention misapprehends basic Sixth Amendment law, under which the question when adversary judicial proceedings commence turns on the *substance* of the proceedings at issue, not the particular label state law attaches to them. It also misrepresents the relevant cases, which addressed proceedings functionally identical to those here and reveal a clear and entrenched split of authority.[1] Because the Fifth Circuit's decision cannot be

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[1] Gillespie County's suggestion (Opp. 3-4, 10, 15) that Rothgery "waived his right to counsel" is both meritless and irrelevant, as neither court below made any such finding. Rothgery waived only his right to have counsel present at the initial appearance itself, as the magistrate noted by underlining the words "at this time" on the form (Pet. App. 36a; *see* Pet. 9), and he submitted a written request for the appointment of counsel shortly after his initial appearance, followed by additional written and oral requests.

reconciled with the holdings of other courts of appeals and state supreme courts, reveals significant confusion as to the proper application of this Court's Sixth Amendment holdings, and poses a significant threat to the values underlying the Sixth Amendment, this Court should grant certiorari.

I. THE FIFTH CIRCUIT'S DECISION CONFLICTS WITH THOSE OF OTHER FEDERAL COURTS OF APPEALS AND STATE COURTS OF LAST RESORT

Gillespie County does not dispute that the Fifth Circuit's "prosecutorial involvement" test conflicts with the analysis employed by other courts of appeals and state supreme courts. Instead, it contends that the outcome in this case can be reconciled on its facts with the decisions by other courts discussed in the petition because those cases involved an "arraignment," rather than an "initial appearance" like that in Rothgery's case. The Fifth Circuit itself did not rely on that distinction, which is meritless.

As an initial matter, this Court has made clear—and the Fifth Circuit itself recognized below—that it is not the state-law label attached to a proceeding, but its functional significance, that determines whether it marks the commencement of adversary judicial proceedings. *See Kirby* v. *Illinois*, 406 U.S. 602, 609 (1972) (Sixth Amendment right attaches whenever

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See Patterson v. *Illinois*, 487 U.S. 285, 293 n.5 (1988) ("petitioner's waiver was binding on him *only* so long as he wished it to be"). Both the district court and the Fifth Circuit assumed the truth of those facts—as to which there was in any event no genuine dispute—for purposes of ruling on Gillespie County's summary judgment motion. Pet. App. 3a-5a, 14a-17a & n.1.

Also meritless and irrelevant is Gillespie County's passing contention (Opp. 4, 16) that Rothgery failed to prove a policy sufficient to establish liability under *Monell* v. *Dep't of Soc. Servs.*, 436 U.S. 658 (1978). Neither court below reached that issue, ruling only that adversary judicial proceedings had not commenced. Pet. App. 2a, 12a, 19a & n.7. In any event, the summary judgment record included uncontested deposition testimony from the Gillespie County Judge—the presiding officer of the county's commissioners court, responsible for indigent defense policy in the county, *see* Tex. Const. art. V, § 18(b)—of a policy of denying appointed counsel to indigent defendants released on bond until after indictment or information. *See* 4 R 537-542, 594, 598 (district court record).

adversary judicial proceedings commence, "whether by way of formal charge, preliminary hearing, indictment, information, or arraignment"); Pet. App. 5a; *see also* Br. *Amici Curiae* Twenty-Two Professors of Law 5-6. Nearly every state provides for an initial court appearance of the kind that occurred here, at which a defendant is informed of the charges against him and committed to custody or bail. Such an appearance may be termed a "first appearance," a "preliminary appearance," an "initial presentment," a "preliminary arraignment," an "arraignment on the warrant," or some other label. LaFave et al., 1 *Criminal Procedure* § 1.3(k), at 113 (2d ed. 1999). As the petition explained, most courts—with some exceptions—have held that such an initial appearance initiates adversary judicial proceedings. *See, e.g., Owen* v. *State*, 596 So. 2d 985, 988-989 (Fla. 1992) ("Although adversary judicial proceedings may commence in a number of ways, ... the [U.S. Supreme] Court and commentators are in agreement that such proceedings clearly have begun when an accused is placed in custody, haled before a magistrate on a warrant or formal complaint, and then tentatively charged with a particular crime at this initial appearance or 'arraignment'"); Pet. 7 n.2. The Fifth Circuit's decision places it firmly in the minority camp.

Moreover, to the extent Gillespie County contends that the cases discussed in the petition involved proceedings that were functionally different than Rothgery's initial appearance, it is mistaken. It attempts to argue, for example, that in certain of those cases the defendant, unlike Rothgery, was required to enter a plea at his court appearance. But Gillespie County uniformly misrepresents the decisions it attempts to distinguish. Those decisions rest on facts functionally identical to those here and are in square conflict with the Fifth Circuit's holding below.

A. The Fifth Circuit's Decision Conflicts With The Decisions Of The Third, Sixth, And Eleventh Circuits

Gillespie County first asserts (Opp. 11) that under Ohio law, the initial appearance at issue in *Mitzel* v. *Tate*, 267 F.3d 524 (6th Cir. 2001), was "an arraignment wherein the defendant must plead to the charges and request a trial by jury or

face waiver of that right," and thus distinguishable from Rothgery's initial appearance. That is incorrect. Rule 5(A) of the Ohio Rules of Criminal Procedure—cited by the Sixth Circuit as the law governing Mitzel's initial appearance, *see* 267 F.3d at 532—provides that "[i]n felony cases," such as Mitzel's, "the defendant *shall not be called upon to plead* ... at the initial appearance," and further provides that the "necessity to make demand" for a jury trial applies only "in petty offense cases." Ohio R. Crim. P. 5(A) (emphasis added); *cf id.* ("In *misdemeanor cases* the defendant may be called upon to plead at the initial appearance.") (emphasis added).[2] The sequence of events in *Mitzel* was precisely the same as here: Mitzel "had been placed under arrest, the police had issued a complaint against him detailing the essential facts of the offense with which he was charged," "he had appeared before a state judge" at an "initial appearance," and "the court ordered that his confinement in jail continue." 267 F.3d at 532. But while the Sixth Circuit held that "[t]here can be no doubt ... that judicial proceedings had been initiated," *id.* (citation and internal quotation marks omitted) (brackets and ellipsis in *Mitzel*), and that the Sixth Amendment right to counsel had therefore attached, the Fifth Circuit held just the opposite.

Similarly, Gillespie County contends (Opp. 13) that the defendant in *Matteo* v. *Superintendent, SCI Albion*, 171 F.3d 877 (3d Cir. 1999) (en banc), had been "arraigned." But the "arraignment" held to trigger the Sixth Amendment right to counsel in *Matteo* was a "*preliminary* arraignment," at which Matteo was committed to jail following arrest. *Id.* at 893 (emphasis added). This preliminary arraignment was held well before the "district attorney filed an information" and Matteo's "arraignment [on the information] was held."

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[2] Gillespie County's reliance on *State* v. *Garris*, 713 N.E.2d 1135 (Ohio Ct. App. 1998), is misplaced. Interpreting Ohio R. Crim. P. 5(A), *Garris* held that the defendant did *not* waive the right to a jury trial by failing to request one at his initial appearance, since he was charged with a "serious offense" (carrying possible incarceration of more than six months) rather than a "petty offense." *Id.* at 1138-1139 (reversing conviction obtained without a jury).

Id. at 892. In substance, then, the "preliminary arraignment" in *Matteo* was precisely the same as the "arraignment on the warrant" at issue in *Brewer* and *Jackson*, or the "initial appearance" in Rothgery's case. *See* Pet. 6 n.1.[3]

Finally, Gillespie County claims (Opp. 13-14) that *Fleming* v. *Kemp*, 837 F.2d 940 (11th Cir. 1988), involved an "arraignment" under Georgia law, at which the defendant may waive rights and plead guilty. In fact, contrary to Gillespie County's representation, the Eleventh Circuit observed that a "formal arraignment had *not* occurred," but nevertheless held that the right to counsel had attached when the defendant had been arrested, brought before a justice of the peace, informed of his rights and the charges against him, and committed to jail—precisely the same sequence of events as in Rothgery's case. *Id.* at 947-948 (emphasis added). Nothing in *Fleming* indicates that the defendant could waive his rights or plead guilty at his initial appearance, and the sole authority Gillespie County cites to that effect stands for precisely the opposite proposition, stating that the judicial officer at the "initial appearance hearing" there "had *no* authority" under Georgia law to "take a guilty plea." *State* v. *Simmons*, 390 S.E.2d 43, 45 (Ga. 1990) (emphasis added). In sum, Gillespie County's effort to reconcile the Fifth Circuit's decision with those of the Third, Sixth, and Eleventh Circuits fails. The law in those circuits is in stark conflict and will remain so unless this Court intervenes.

B. The Fifth Circuit's Decision Conflicts With The Decisions Of State Courts Of Last Resort

Gillespie County similarly seeks to distinguish *O'Kelley* v. *State*, 604 S.E.2d 509 (Ga. 2004), as a case at which the defendant was "arraign[ed]" (Opp. 14), but the proceeding in *O'Kelley* was again functionally indistinguishable from that in Rothgery's case. O'Kelley was arrested; "taken before a mag-

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[3] Pennsylvania law confirms that Matteo's preliminary arraignment was functionally identical to Rothgery's initial appearance. *See* Pa. R. Crim. P. 540 (at a "preliminary arraignment," the court "shall not question the defendant about the offense(s) charged but shall read the complaint to the defendant," inform him of his rights, and set bail or commit the defendant to jail).

istrate judge in a jailhouse courtroom" the same day for an "initial appearance hearing," where no prosecutor was present; informed of his rights and the charges against him; and committed to jail. 604 S.E.2d at 510, 512. Moreover, contrary to Gillespie County's contention (Opp. 14) that Georgia law permitted O'Kelley to "waive certain rights and plead guilty" at his initial appearance, the Georgia Supreme Court observed that there were "no issues to resolve" at his appearance other than scheduling court dates and determining O'Kelley's need for court-appointed counsel, and that O'Kelley was "informed that he was *not* to enter a plea." 604 S.E.2d at 510-511 (emphasis added). Yet, because O'Kelley had been confronted by a court with the charges against him and committed to jail, the court concluded that, under *Jackson*, "O'Kelley's Sixth Amendment right to counsel attached at his initial appearance." *Id.* at 512. Significantly, *O'Kelley* expressly overruled the Georgia court's previous holding that an initial appearance at which no prosecutor was present did not trigger the right to counsel—precisely the analysis employed by the Fifth Circuit here—finding it inconsistent with this Court's decision in *Jackson*. *See id.* at 511-512.

Gillespie County argues (Opp. 14-15) that *State* v. *Jackson*, 380 N.W.2d 420 (Iowa 1986), was decided under Iowa law and based on the "significant level of prosecutorial involvement" in the filing of the complaint by a "county attorney." To the contrary, the Iowa Supreme Court observed that "police investigators" (not a "county attorney") "filed a complaint before a magistrate accusing defendant" of murder; explained that although "the record does *not* demonstrate participation by a prosecuting attorney in the proceedings," there was no doubt that "the prosecutorial forces had focused their attention on defendant as a perpetrator" by the time of his initial appearance; and therefore held that the defendant's "sixth and fourteenth amendment" (not Iowa state law) "right to counsel had attached." *Id.* at 422-424. Like *O'Kelley*, *Jackson* thus clearly rejected the Fifth Circuit's prosecutorial involvement analysis.

Finally, Gillespie County asserts (Opp. 15) that the decisions of the courts in New Jersey, Arkansas, and Florida dis-

cussed in the petition (Pet. 16-17) involved "arraignments," but those proceedings, too, did not differ from Rothgery's initial appearance. In *State* v. *Tucker*, 645 A.2d 111 (N.J. 1994), the Supreme Court of New Jersey held that the defendant's Sixth Amendment right to counsel attached when he was arrested, brought before a municipal court judge for an "initial appearance" on a police complaint charging burglary and robbery, and committed to jail. *See id.* at 114-115, 119, 128, 130. Although this "first court appearance" occurred long before indictment and, consistent with standard practice, no prosecutor was present at the hearing, the court held that the defendant's initial appearance was "equivalent" to the "arraignment" in *Jackson*, and that the Sixth Amendment right to counsel had therefore attached. *Id.* at 119, 123, 127; *see also Bradford* v. *State*, 927 S.W.2d 329, 333, 335 (Ark. 1996) (under *Jackson*, "the Sixth Amendment right to counsel had clearly attached" when the defendant was arrested and "appeared" before a magistrate, who "determined that there was probable cause to support the charges against her" and "fixed bond"); *Owen*, 596 So. 2d at 987-989 & nn.4-7 (defendant's Sixth Amendment right to counsel attached at his "first appearance" before a magistrate, at which he was informed of the charges against him and committed to custody).[4] The Fifth Circuit's analysis and result are in sharp conflict with these holdings by state courts of last resort.

II. THE FIFTH CIRCUIT'S ANALYSIS CANNOT BE RECONCILED WITH THIS COURT'S SIXTH AMENDMENT PRECEDENT

Gillespie County relies on the same linguistic sleight of hand to argue that the decision below does not conflict with this Court's decisions in *Brewer* and *Jackson*, contending (Opp. 10) that those cases are distinguishable because the defendants were "arraigned." But, in both cases, this Court used the term "arraignment" to refer to the same type of initial court appearance that occurred in Rothgery's case. *See* Pet. 6-7 & nn.1-2; Br. *Amici Curiae* Twenty-Two Professors of Law 6-7; *Owen*,

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[4] Gillespie County makes no attempt to distinguish *State* v. *Barrow*, 359 S.E.2d 844 (W. Va. 1987), which also held that an initial appearance equivalent to that here triggers the right to counsel. *See* Pet. 17.

596 So. 2d at 989 n.7. Thus, in *Brewer*, this Court held that "[t]here can be no doubt ... that judicial proceedings had been initiated" after the defendant had been arrested, "had been arraigned on [the arrest] warrant before a judge," and "had been committed by the court to confinement in jail." *Brewer* v. *Williams*, 430 U.S. 387, 399 (1977). The defendant in *Brewer* had neither been indicted nor asked to enter a plea. Rather, the "arraignment on the warrant" in *Brewer* referred to an initial appearance before a judge at which the defendant was informed of the charges against him and committed to custody (in contrast to an "arraignment on indictment" at which a defendant enters a plea). *See* Pet. 6 n.1. Likewise, in *Jackson*, both defendants were "arraigned" before a magistrate judge one day after arrest and bound over to jail. *Michigan* v. *Jackson*, 475 U.S. 625, 627-628 (1986).[5] The proceedings in *Brewer* and *Jackson* were functionally the same as in Rothgery's case—arrest, initial appearance before a court where the defendant is informed of the charges against him, and commitment to confinement or bail—and in both cases, this Court held that these events "signal[] 'the initiation of adversary judicial proceedings' and thus the attachment of the Sixth Amendment." *Id.* at 629 & n.3; *see Brewer*, 430 U.S. at 399.[6]

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[5] *See* 1A Gillespie, *Michigan Criminal Law and Procedure* § 16.1 (2007) (under Michigan law, an "arraignment on the warrant" is "the first appearance by the defendant" before a magistrate, at which the defendant is informed of the charges and the right to counsel, and bail may be fixed).

[6] As the petition demonstrated (Pet. 19-21), this Court did not consider it relevant in either case whether a prosecutor was involved in the proceedings. Gillespie County notes (Opp. 10) that the lower court in *Jackson* stated that the "prosecutor's office approved" the complaint leading to arraignment. But this Court never mentioned—much less relied on—any involvement by prosecutors in *Jackson* (or *Brewer*) to reach its holding. To the contrary, *Jackson* made clear that "the Sixth Amendment concerns the confrontation between the State and the individual." 475 U.S. at 634. Where, as here, a defendant stands accused of a crime by a police officer's sworn complaint brought "in the name and by the authority of the State" (Pet. App. 33a), and a court has found probable cause to believe the defendant committed that crime and bound him over to jail (or bail), the defendant is "faced with the prosecutorial forces of organized society," and his Sixth Amendment right to counsel attaches. *Id.* at 631;

Gillespie County also opines (Opp. 7-8) that the Fifth Circuit's decision is consistent with *United States* v. *Gouveia*, 467 U.S. 180 (1984). But in *Gouveia*, unlike here, the defendants—prisoners suspected in another inmate's murder—had not been arrested or brought before a court for an initial appearance on criminal charges. *Id.* at 183-184. They had merely been placed in the prison's administrative segregation unit while the crime was investigated. *Id.* The Ninth Circuit thus acknowledged that "adversary judicial proceedings" had *not* commenced, yet held that the defendants' right to counsel had attached. *Id.* at 185-186. In reversing, this Court simply reaffirmed its long-standing precedent holding that the right to counsel attaches when adversary judicial proceedings are initiated—and not before. *Id.* at 187, 192-193. Because such proceedings *had* commenced here, on facts materially identical to those in *Brewer* and *Jackson*, the Fifth Circuit's holding that Rothgery had no right to counsel cannot be reconciled with this Court's precedent.[7]

III. THE FIFTH CIRCUIT'S "PROSECUTORIAL INVOLVEMENT" TEST THREATENS BASIC SIXTH AMENDMENT VALUES AND WILL PERSIST UNLESS CORRECTED BY THIS COURT

As discussed above, while Gillespie County defends the Fifth Circuit's decision based on the erroneous distinction between Rothgery's initial appearance and an arraignment, the Fifth Circuit did not decide the case on that basis, but instead held that the Sixth Amendment right to counsel does

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see Br. *Amici Curiae* Twenty-Two Professors of Law 8-9 (the Fifth Circuit's "prosecutorial involvement" test "could hardly be less true to the Sixth Amendment's purpose or this Court's precedents").

[7] Gillespie County also asserts (Opp. 4) that no "critical pretrial proceedings" occurred before Rothgery's indictment. The Fifth Circuit expressly declined to reach that issue, noting that Gillespie County had not raised it. Pet. App. 5a n.5. In any event, as *Jackson* made clear, "[t]he question whether arraignment" or a functionally similar proceeding "signals the initiation of adversary judicial proceedings ... is distinct from the question whether the [proceeding] is a critical stage requiring the presence of counsel." 475 U.S. at 629 n.3. Only the former question was addressed by the Fifth Circuit, and only the former is at issue here.

not attach at a defendant's initial appearance unless the defendant can show that a prosecutor was involved. The Fifth Circuit's "prosecutorial involvement" test not only misapprehends this Court's precedent and splits with other lower courts, but threatens core Sixth Amendment values.

Under the Fifth Circuit's rule, a court may commit an indigent defendant arrested without a prosecutor's involvement to jail for long periods without any access to counsel. As *amici* explain, that rule is inconsistent with the history and purposes of the Sixth Amendment, which establish that a defendant's right to counsel attaches when a court restricts his liberty after finding probable cause to believe he has committed a crime. *See* Br. *Amici Curiae* Twenty-Two Professors of Law 3, 9-15. Here, had counsel been appointed after Rothgery's initial appearance, the mistake underlying his arrest would quickly have been uncovered and the charges dismissed. Instead, Rothgery's bail was increased, he was rearrested, and he was wrongfully jailed for a crime he did not commit, because, without the assistance of counsel, "he [did] not know how to establish his innocence." *Powell* v. *Alabama*, 287 U.S. 45, 69 (1932). That result offends the fundamental principles underpinning the right to counsel.

Moreover, the Fifth Circuit has made clear that it will not alter its holding absent this Court's intervention. As Gillespie County notes (Opp. 8-9), the Fifth Circuit adopted its "prosecutorial involvement" test in *McGee* v. *Estelle*, 625 F.2d 1206 (5th Cir. 1980). Even as other courts have repudiated similar approaches in light of this Court's decision in *Jackson*, *see, e.g.*, *O'Kelley*, 604 S.E.2d at 511-512, the Fifth Circuit has adhered to its misguided rule. Because that rule—the governing law throughout Texas, Louisiana, and Mississippi—seriously undermines the right to counsel for the vast majority of felony defendants who, like Rothgery, cannot afford a lawyer to contest substantial court-imposed deprivations of liberty, this Court's review is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

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NOVEMBER 2007

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FILED
OCT 31 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 07-440

In the Supreme Court of the United States

WALTER ALLEN ROTHGERY
Petitioner,

v.

GILLESPIE COUNTY, TEXAS
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICI CURIAE* TWENTY-TWO PROFESSORS OF LAW IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether Petitioner's right to counsel under the Sixth Amendment had attached after he was arrested and brought before a magistrate who informed him of his rights and of the accusation against him, found probable cause that he had committed the offense he was accused of, and committed him to jail pending trial or the posting of bail.

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Francis H. Heller, *The Sixth Amendment to the Constitution of the United States* (1951) 9, 10

U.S. Dept. of Ed., National Center for Education Statistics, Literacy Behind Bars: Results from the 2003 National Assessment of Adult Literacy Prison Survey (2007), *available at* http://nces.ed.gov/pubs2007/2007473.pdf..... 12

U.S. Dept. of Justice, Bureau of Justice Statistics, C. Harlow, Defense Counsel in Criminal Cases (2000), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/dccc.pdf)..... 11

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INTEREST OF *AMICI CURIAE*[1]

Amici are law professors[2] whose teaching and research interests include matters of criminal procedure. *Amici* have an interest in this case because the lower court's decision undermines the right to counsel protected under the Sixth Amendment. As professors of law, *amici* are keenly aware of the essential role that counsel play in

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[1] The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the *amici curiae*'s intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission.

[2] This brief represents the views of the following professors of law: Susan Bandes, DePaul University School of Law; John Blume, Cornell Law School; Craig Bradley, Indiana University School of Law–Bloomington; Joshua Dressler, Ohio State University Moritz School of Law; Stuart Green, Louisiana State University Paul M. Hebert Law Center; Bernard Harcourt, University of Chicago Law School; Susan N. Herman, Brooklyn Law School; John Junker, University of Washington School of Law; Yale Kamisar, University of Michigan Law School; Arnold Loewy, Texas Tech University School of Law; Eric Luna, University of Utah S.J. Quinney College of Law; Bridget McCormack, University of Michigan Law School; Tracey Meares, Yale Law School; David Moran, Wayne State University Law School; Daniel Richman, Columbia Law School; Stephen Saltzberg, George Washington University Law School; Christopher Slobogin, University of Florida Levin College of Law; Carol Steiker, Harvard Law School; Jordan Steiker, University of Texas School of Law; George Thomas, Rutgers School of Law–Newark; James Tomkovicz, University of Iowa College of Law; and Charles Whitebread, University of Southern California Law School. They do not join this brief as representatives of their respective institutions.

protecting the integrity of our criminal justice system. Our nation relies upon its lawyers to defend those whose freedom is at stake and to ensure that justice is done to all persons, innocent and guilty, wealthy and poor. *Amici* file this brief to urge this Court to grant the petition and clarify the rule governing attachment of the right to counsel to reduce the risk of erroneous decisions.

INTRODUCTION

In this case, an innocent man was arrested and jailed twice for a crime it was legally impossible for him to commit—he was accused of being a felon in possession of a firearm, though he was not in fact a felon at all.[3] Once his oft-repeated request for appointed counsel was finally granted, the charges against him were determined to be baseless and dropped—but not before Petitioner Walter Rothgery spent weeks in jail. Pet. 3. This case presents the Court with an opportunity to prevent such injustices in the future by clarifying its rule regarding when the Sixth Amendment right to counsel attaches.

This Court has consistently held that the right to counsel under the Sixth Amendment[4] attaches at the initiation of adversary judicial proceedings. But because such proceedings may commence in a variety of ways—*e.g.*, by charge, indictment, information, or

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[3] *Amici* do not separately recite the facts of this case, but rely on the statement of facts in the Petition.

[4] Rothgery's right to counsel arose under the Fourteenth Amendment, which incorporates the protection of the Sixth Amendment. *See Gideon v. Wainwright*, 372 U.S. 335, 342 (1963). For simplicity's sake, this brief refers to the right to counsel as a Sixth Amendment right.

arraignment—that rule is not always easy to apply. The result is lower court confusion and error, as illustrated by the Fifth Circuit's decision below. Indeed, as the Petition shows, that decision reflects a division of authority among the lower courts regarding when the right to counsel attaches.

This Court should grant review to address that split. *Amici* further urge, however, that in doing so the Court should adopt a clear rule that will simplify the analysis of when the right to counsel attaches. The history and purposes of the Sixth Amendment, as well as this Court's precedents, support the conclusion that the Sixth Amendment guarantees a right to counsel to defend a person's liberty when that liberty is threatened. The current "initiation of judicial proceedings" rule attempts to get at when such defense is needed. *Amici* submit that a modest refinement of the test would dramatically improve it.

Specifically, *amici* propose that the Court make explicit what is already implicit in the cases. The Court should hold that, following a warrantless arrest, adversary judicial proceedings have commenced when there has been a judicial determination of probable cause and the government has imposed significant restrictions on a person's liberty. Such a rule is consistent with this Court's precedents and readily applicable notwithstanding the vagaries of state procedure.

The holding *amici* suggest draws upon two lines of authority. In one, this Court has explained that the right to counsel attaches at the initiation of adversary judicial proceedings—the point at which a "suspect" becomes an "accused." *Michigan v. Jackson*, 475 U.S. 625, 632 (1986); *see also Brewer v.*

Williams, 430 U.S. 387, 398 (1977). In the second line of authority, this Court has held that the government may not impose significant restraints upon a person's liberty for more than 48 hours following arrest without a judicial determination of probable cause. *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991); *Gerstein v. Pugh*, 420 U.S. 103 (1975). These two lines of authority, read together, support a simple, bright-line rule: at the latest, once a *Gerstein* hearing is complete and the magistrate has found probable cause to believe the accused has committed a crime, the right to counsel attaches. Such a rule is supported by the Court's decisions in *Argersinger v. Hamlin*, 407 U.S. 25 (1972), and its progeny, which hold that a person is entitled to appointed counsel if the government intends to deprive him of his freedom for even a single day.

The proposed rule would not require counsel to be appointed for the *Gerstein* hearing; it would simply recognize that the right has attached once the hearing is complete. Such a rule, in accord with this Court's precedents, would ensure that when the government has significantly restrained an accused's liberty and has no intention to release him, he will have the assistance of counsel to defend himself.

ARGUMENT

I. The Court Should Grant the Petition to Clarify When the Right to Counsel Attaches.

The Court should grant review in this case because the rule for determining when the right to counsel attaches has created confusion in the lower courts—confusion only this Court can resolve.

Moreover, this case presents an opportunity for the Court to provide clear guidance for future cases.

A. Under this Court's precedents, the right to counsel attaches at the initiation of adversary proceedings.

This Court has long held that the right to counsel attaches at the initiation of adversary judicial proceedings. *See, e.g.*, *Brewer v. Williams*, 430 U.S. 387, 398 (1977) (citing cases). The Court has made clear that adversary proceedings might commence in any number of ways, such as by "formal charge, preliminary hearing, indictment, information, or arraignment." *Id.* But no matter *how* proceedings might commence, this Court has consistently said that the right to counsel attaches *as soon as they do*.

Thus, in *Michigan v. Jackson*, 475 U.S. 625 (1986), the Court summarily rejected the argument that under Michigan's particular procedures, arraignment did not sufficiently affect the defendant's rights to justify attachment of the right to counsel. *See id.* at 629 n.3. The Court explained that the Sixth Amendment provides a right to counsel once "a person who had previously been just a 'suspect' has become an 'accused,'" including by formal accusation at an arraignment. *Id.* at 632.

In contrast, *before* the initiation of adversary judicial proceedings, there is no right to counsel. In *Kirby v. Illinois*, 406 U.S. 682 (1972), for example, the Court held that the right to counsel had not attached when Kirby was identified in a police lineup shortly after arrest. *Id.* at 684-85 (plurality op). In *Jackson*'s terms, Kirby—who had been picked up by the police for carrying another man's social security

card and travelers' checks—was merely a suspect when his victim came in and identified him. *See id.*

This Court's focus on the initiation of adversary judicial proceedings—the moment of transition between "suspect" and "accused"—reflects an understanding that varied state procedures, and the varied facts of specific cases, make it hard to identify a single, specific triggering event at which the right to counsel attaches in all cases. Instead, the Court's rule is essentially that the right to counsel attaches *whenever* the state determines that it shall be adverse to an individual, seeking to deprive him of his liberty. *See Brewer*, 430 U.S. at 398; *Kirby*, 406 U.S. at 689.

B. The decision below illustrates the need for a clear rule.

The Fifth Circuit's decision below cannot be squared with this Court's precedents. It is clear that Rothgery was, in fact, arraigned when he appeared in front of the magistrate. *See* Pet. 6 n.1 (explaining meaning of arraignment); Pet. App. 14a-15a (describing Rothgery's appearance before the magistrate). In light of the Court's statement in *Jackson* about the importance of arraignment, the fact that Rothgery had been arraigned should have ended the inquiry into the commencement of proceedings. *See Jackson*, 475 U.S. at 629 n.3 (noting the "clear language in our decisions about the significance of arraignment"). Similarly, the *Jackson* Court's discussion of the Sixth Amendment significance of the line between being a "suspect" and an "accused" should have dispelled any doubt that Rothgery's right had attached. *See id.* at 632 (distinguishing between being an accused and a

suspect); Pet. App. 15a (court below noting that the magistrate "informed Rothgery that Rothgery was *accused* of the criminal offense of unlawful possession of a firearm by a felon") (emphasis added).

The Fifth Circuit, however, declined to recognize the significance of the fact that Rothgery's arraignment made him an "accused."[5] Instead, the lower court—focusing on language from Justice Stewart's plurality opinion in *Kirby*—concluded that the right to counsel attaches only when "the government has committed itself to prosecute and a defendant finds himself faced with the prosecutorial forces of organized society." Pet App. 5a-6a (citations and quotation marks omitted). Because Rothgery had not proved that the *prosecutor* knew about the arrest and the arraignment, the Fifth Circuit held that Rothgery's right to counsel had not attached. *See* Pet. App. 12a.[6]

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[5] The Fifth Circuit also decided that it was not clear that the police officer's affidavit filed against Rothgery "charged" him in a manner sufficient to constitute the initiation of adversary proceedings. *See* Pet. App. 9a-11a. It is unclear how the court below reconciled the fact that Rothgery was not free to go following his arraignment with its conclusion that he had not been charged. *Amici* submit that, as a general matter, the Constitution entitles a person to be released if he is not charged with a crime for which there has been a judicial determination of probable cause within 48 hours of being arrested. *See County of Riverside v. McLaughlin*, 500 U.S. 44, 55-56 (1991).

[6] Even on its own terms, the Fifth Circuit's decision is incorrect. This Court has held that the knowledge of one state actor must be imputed to another in the Sixth Amendment context. *See Jackson*, 475 U.S. at 634 (stating that, in the Sixth Amendment context, "we impute the State's knowledge from one state actor to another"). The Court explained: "the Sixth Amendment concerns the confrontation between the State and the

What a prosecutor happens to know has little to do with whether an individual has been accused, and *Kirby* does not suggest otherwise. There, Justice Stewart was merely explaining why the right to counsel does not apply when a person has been arrested but *not* charged, as in *Kirby*. Again, as the *Jackson* Court would have put it, Kirby was a mere suspect rather than an accused. *See Jackson*, 475 U.S. at 632. Rothgery was plainly an accused.

The Fifth Circuit's decision, however, is not merely erroneous; it demonstrates the need for this Court to adopt a clear rule. The flexibility of this Court's rule—which acknowledges that adversary proceedings might commence in any number of ways—contributed to the Fifth Circuit's confusion. The lower court saw its task as anything but easy, seeking to discern the "sometimes elusive degree to which the prosecutorial forces of the state have focused on an individual." Pet. App. 5a-6a. In other words, instead of recognizing Rothgery's need for counsel when counsel could have kept him from jail, the Fifth Circuit felt impelled to comb the record to see who in the state government knew what about

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individual. One set of state actors (the police) may not claim ignorance of defendants' unequivocal request for counsel to another state actor (the court)." *Id.* If the police cannot claim ignorance of what occurs in court, there is no justification for permitting a prosecutor, an officer of the court, to claim ignorance of an arraignment that occurred in court, especially since it is the prosecutor's job to learn about such charges and to decide whether to press or drop them. In any event, the Fifth Circuit's innovative prosecutorial-involvement test is barred by *Jackson*. Moreover, even if the Court had not already rejected such a test, Petitioner is right that a prosecutorial-involvement test is unworkable in practice. *See* Pet. 3-4.

Rothgery's case when. Such an approach could hardly be less true to the Sixth Amendment's purpose or this Court's precedents. But in the absence of clearer guidance from this Court, errors such as the one committed in the court below are likely to be repeated. Indeed, as the Petition demonstrated, the Fifth Circuit is not the first court to have made such a mistake. *See* Pet. 12-18.

This Court, then, should grant review to address the split among the lower courts and to adopt a clear rule. *Amici* propose that consistent with the purposes and history of the Sixth Amendment and this Court's precedents, the Court should hold that following a warrantless arrest, the right to counsel attaches, at the latest, once a court has found probable cause to commit an accused to custody or set bail.

II. This Court Should Hold that the Right to Counsel Attaches, at the Latest, Once a Court Has Found Probable Cause to Commit an Accused to Custody.

A. The Sixth Amendment guarantees a right to counsel to defend an accused's liberty.

Under the common law, while parties in civil cases and misdemeanor defendants were entitled to counsel, defendants in felony cases had no right to the assistance of counsel. Francis H. Heller, *The Sixth Amendment to the Constitution of the United States* 9-10 (1951). *Cf.* William M. Beaney, *The Right to Counsel in American Courts*, 8-11 (1955) (noting that judges in England recognized the injustice of the rule and sometimes permitted counsel to play a role in the defense). That rule changed only slightly after the Glorious Revolution, when defendants in treason

cases gained the right to counsel (a matter of special concern to the political classes). Heller, *supra*, at 10. But it was not until 1836 that those accused of other felonies were granted the right to counsel. *Id.*[7]

The Sixth Amendment rejected the common law approach. *Id.* at 109; *see also Powell v. Alabama*, 287 U.S. 45 (1932). This Court, in explaining that the common law rule never gained traction in America, assessed it harshly: "An affirmation of the right to the aid of counsel in petty offenses, and its denial in the case of crimes of the gravest character, where such aid is most needed, is ... outrageous and ... obviously a perversion of all sense of proportion." *Powell*, 287 U.S. at 60. In America, the Court noted, the right to be heard by counsel has always been seen to be "fundamental." *Id.* at 68, 70, 73.

The American rule, embodied in the Sixth Amendment, recognizes that "the right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel." *Id.* at 68-69. Indeed, in our Nation's tradition, the importance of having counsel to represent one's interests can hardly be overstated. This Court has approvingly quoted the adage that "a lawyer who represents himself has a fool for a client." *Kay v. Ehrler*, 499 U.S. 432, 438 (1991). The layman is in

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[7] The common law deprived the accused of other rights that are now explicitly protected by the Sixth Amendment. For example, until 1606, an accused was not permitted to present witnesses at all in his defense. Heller, *supra*, at 9. Even then, defense witnesses could not be sworn; that right was denied until the beginning of the eighteenth century for felony trials. *Id.* & n.34. At common law, an accused felon was not even entitled to receive a copy of the indictment against him. *Id.* at 10.

even greater need of counsel. Justice Sutherland, writing for the Court in *Powell*, explained:

> Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.

287 U.S. at 69. Justice Sutherland continued: "If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect." *Id.*

Those words aptly describe the situation of indigent defendants today, who depend on the court to protect their right to counsel. As this Court is aware, approximately eighty percent of state felony defendants use court-appointed lawyers. *Kowalski v. Tesmer*, 543 U.S. 125, 140 (2004) (Ginsburg, J., dissenting) (citing U.S. Dept. of Justice, Bureau of Justice Statistics, C. Harlow, Defense Counsel in Criminal Cases 1, 5 (2000), available at http://www.ojp.usdoj.gov/bjs/pub/pdf/dccc.pdf). Many

of those defendants, like sixty-eight percent of the state prison population, did not complete high school; many lack basic literacy skills. *Halbert v. Michigan*, 545 U.S. 605, 621 (2005) (citations omitted). Indeed, this Court has observed that seven of ten inmates are unable to perform such basic tasks as writing a letter to explain an error on a credit card bill, using a bus schedule, or stating in writing an argument made in a newspaper article. *Id.*; *see also* U.S. Dept. of Ed., National Center for Education Statistics, Literacy Behind Bars: Results from the 2003 National Assessment of Adult Literacy Prison Survey, 5-7, 13 (2007), available at http://nces.ed.gov/pubs2007/2007473.pdf.

In light of the history of the Sixth Amendment and recognizing the fact that lawyers are "necessities, not luxuries," *Gideon*, 372 U.S. at 344, courts have insisted on a broad understanding of the right to counsel. On its face, the Sixth Amendment provides only that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence." But this Court has construed "prosecution" to comprehend the pre-trial period, "when consultation, thorough-going investigation and preparation [are] vitally important," in addition to the trial. *Powell*, 287 U.S. at 57 (citing *Burgess v. Riseley*, 13 Abb. N. Cas. 186 (N.Y. Sup. Ct. 1883); *Batchelor v. State*, 125 N.E. 773 (Ind. 1920)). The relevant question, this Court has explained, is whether counsel would be able to assist an individual in protecting "*any* rights [he] did possess." *United States v. Wade*, 388 U.S. 218, 223-24 (1967) (emphasis added, citation and quotation marks omitted).

The Court's statement in *Powell* that the right to counsel applies beyond the confines of trial was hardly novel. In *Burgess*, the New York case on which the *Powell* Court relied, the court rejected the argument that a person "committed by a magistrate" and confined before an indictment was returned was not entitled to see his lawyer. 13 Abb. N. Cas. at 186. The court pointed out that the accused, even before indictment, has rights: "He may claim, perhaps, that his detention is illegal; that the evidence taken before the magistrate was insufficient, and may desire, through counsel, to obtain a writ of *habeas corpus*, or some other process to inquire into the legality of his imprisonment." *Id.* at 188. To protect these rights, the right to counsel should "be so construed as to give every one accused of or arrested for crime the benefit of counsel at every step and stage of the proceeding. This construction is demanded by every consideration of humanity, and the enlightened views of personal rights resulting from Christian civilization." *Id.* at 188-89.

In *Batchelor*, too, the court held that an accused had been denied the right to counsel when, after arrest but before indictment or arraignment, he had repeatedly asked to see a lawyer, and had been refused. Though he was explicitly told that he had a right to a lawyer at his arraignment, the court held that his right to counsel had been denied, noting the time he had been in custody without being permitted to see a lawyer. 125 N.E. at 776.

These and other cases confirm that the underlying purpose of the Sixth Amendment is the assistance of counsel to contest government-imposed restraints on liberty, and not merely a right to legal

assistance at trial. That is why, as the *Burgess* court explained, a person may meet with his lawyer to ask the lawyer to file a petition for a writ of habeas corpus prior to an indictment. *See also* Akhil Reed Amar, *Twenty-Fifth Annual Review of Criminal Procedure: Foreward: Sixth Amendment First Principles*, 84 Geo. L.J. 641, 705 (1996) (explaining that an accused may need to file a petition for a writ of habeas corpus if he is detained prior to trial). As discussed in Part I, *supra*, consistent with this broad understanding of the right to counsel, this Court has long held that the right attaches at the beginning of adversary proceedings—that is, as soon as a person truly needs counsel to protect his interests. *See Brewer*, 430 U.S. at 398.

Indeed, it would be contrary to the most fundamental postulates of our legal system to conclude that, in a garden-variety criminal case, a person could be arrested and denied access to a lawyer to file a petition for habeas corpus simply *because* the state decided to hold the person without indictment or trial. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 539 (2004) (plurality opinion) (noting that, even in the context of an alleged enemy combatant seeking habeas relief, the petitioner "unquestionably has the right to access to counsel"); *id.* at 554-55 (Scalia, J., dissenting) ("The very core of liberty secured by our Anglo-Saxon system of separated powers has been freedom from indefinite imprisonment at the will of the Executive."). Yet that is effectively what the court below decided—that Rothgery had *no right to counsel at all* until the indictment was filed. *See* Pet. App. 12a. The Sixth Amendment's history and purpose compel a much broader understanding of the right to counsel: the

right to counsel must be understood to be a right to not be denied counsel when counsel is necessary to defend one's freedom.

B. This Court should declare that adversary judicial proceedings commence once a court has found probable cause to commit an accused to custody.

There is a very straightforward way of determining whether counsel is necessary to defend an individual's freedom—look to whether a court has imposed restrictions on that freedom. Specifically, *amici* urge this Court (consistent with the history and purposes of the Sixth Amendment set forth above) to hold that, following a warrantless arrest, the right to counsel attaches at the latest once there has been a judicial determination that there is probable cause to impose significant restrictions on a person's liberty.[8]

Such a rule is supported by this Court's approach in *Gerstein v. Pugh*, 420 U.S. 103 (1975), and *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991). *Gerstein* held that a person arrested without a warrant must be "promptly" brought before a magistrate for a determination of probable cause, if the state wishes to impose any significant restraint on him prior to trial. *Gerstein*, 420 U.S. at 125. *Riverside* clarified what qualified as "prompt" under *Gerstein*, holding that a person presumptively may not be held more than 48 hours following arrest without a judicial determination of probable cause. *Riverside*, 500 U.S. at 47, 56. The Court's decision in

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[8] The right to counsel would attach earlier if adversary proceedings had already been initiated.

Riverside simplified the determination required under *Gerstein*, and a similar clarification for when the right to counsel attaches will likewise reduce uncertainty and assist the lower courts.

Additionally, the reasoning of *Gerstein* and *Riverside* is substantially applicable here. *Gerstein* explained: "The consequences of prolonged detention may be more serious than the interference occasioned by arrest. Pretrial confinement may imperil the suspect's job, interrupt his source of income, and impair his family relationships. Even pretrial release may be accompanied by burdensome conditions that effect a significant restraint of liberty." *Gerstein*, 420 U.S. at 114 (citations omitted). *Riverside* held that 48 hours is a reasonable measure of the "prolonged detention" that cannot constitutionally be imposed without a judicial probable cause determination. *Riverside*, 500 U.S. at 56; *see also Gerstein*, 420 U.S. at 125 n.26 (explaining that the "key factor is [whether there is] significant restraint on liberty"). These decisions recognize that, while a person does not have a right to counsel at an informal initial probable cause determination, a person's right to liberty speaks more forcefully after 48 hours have passed. He is, therefore, entitled to a judicial proceeding before his liberty can continue to be significantly restrained. And, as set forth above, once a person's liberty has been restrained in a judicial proceeding, he has need of, and is entitled to, counsel to defend that liberty.

Accordingly, this Court should declare that after a *Gerstein* hearing, at the latest, the right to counsel has attached. Such a rule is consistent with this Court's precedents. *See Jackson*, 475 U.S. at 629 n.3

(noting the "clear language in our decisions about the significance of arraignment" and affirming that the right to counsel had attached once the defendant was arraigned); *see also Brewer*, 430 U.S. at 398 ("Whatever else it may mean, the right to counsel granted by the Sixth and Fourteenth Amendments means at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been *initiated* against him—*whether by way of formal charge, preliminary hearing, indictment, information, or arraignment*") (emphasis added, citations and quotation marks omitted). But it would also greatly simplify the determination a court must make—a determination that, as the Petition showed, has bedeviled the lower courts. *See* Pet. 12-18 (discussing split of authority among the lower courts); *see also* Pet. App. 5a-6a (the court below discussing its need to discern the "sometimes elusive degree to which the prosecutorial forces of the state have focused on an individual") (citation and quotation marks omitted).

Amici do not suggest that a person is entitled to appointed counsel at a *Gerstein* hearing. *See Gerstein*, 420 U.S. at 122. Rather, it is *after* the government has determined that it will restrain a person's liberty for more than 48 hours, and thus has provided him with a *Gerstein* hearing, that the right to counsel attaches. Again, that this is the appropriate timeframe follows from *Riverside* and *Gerstein*. In effect, if the government does not unconditionally release a person following his *Gerstein* hearing, it has said: "We are restraining you because we believe you have probably committed a crime." It is at that point that a person needs counsel

to defend his liberty. The Sixth Amendment, properly understood, protects that right.

The proposed rule is also consistent with this Court's decisions in *Argersinger v. Hamlin*, 407 U.S. 25 (1972), and its progeny. Those cases hold that, in any criminal prosecution where a person's freedom is at stake, even for a single day, he is entitled to counsel. *Id.* at 33; *see also Glover v. United States*, 531 U.S. 198, 203 (2001) ("*any* amount of actual jail time has Sixth Amendment significance") (emphasis added). As the Court explained, "incarceration [is] so severe a sanction that it should not be imposed ... unless an indigent defendant ha[s] been offered appointed counsel." *Scott v. Illinois*, 440 U.S. 367, 372-73 (1979). Indeed, a person may not even be given a suspended sentence of imprisonment without first being provided counsel. *Alabama v. Shelton*, 535 U.S. 654 (2002).

So long as an uncounseled accused may not be sentenced to even a day's confinement, the only justification for denying a jailed person a lawyer *prior* to trial should be that, for all the practical reasons that underlay *Riverside*, the government is entitled to hold him for up to 48 hours based on a police officer's reasonable determination of probable cause. After that point, however, he should be entitled to the protections of the judicial system, including a neutral magistrate's determination of probable cause and counsel to defend his freedom.

Even assuming that the right to counsel applies to a person *held* for more than 48 hours, it might be argued that bail is different—that the right to counsel should not necessarily attach if a person is admitted to bail following a judicial determination of

probable cause.[9] Yet such an argument would be mistaken for three reasons. Most fundamentally, this Court has made clear that the right to counsel attaches at the initiation of adversary proceedings. *See Brewer*, 430 U.S. at 398. Whether an accused is admitted to bail or not at a judicial proceeding does not change whether the government is "adverse" to him in any meaningful sense. Second, to argue that a person is not entitled to counsel if he is admitted to bail ignores the substantial restraints on liberty such a status can imply. *See Gerstein*, 420 U.S. at 114. Third, this Court has held that a person cannot be subjected to a suspended sentence of confinement without having a right to counsel. *Shelton*, 535 U.S. 654. A person admitted to bail is in a similar state. He may face the prospect of jail at any moment, including, for example, if he should commit a crime (even one for which he could not be imprisoned), or if he should lose his job. *See* 18 U.S.C. § 3142(c)(1)(A), (B)(ii). There is no justification for denying a person in such circumstances the right to have a lawyer challenge the terms of his bail.[10]

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[9] The decision below is inconsistent even with that result. The Fifth Circuit concluded that Rothgery's right to counsel attached only once the prosecutor obtained an indictment against him. *See* Pet. App. 5a-6a, 12a (asserting that the right to counsel attaches "when the government has committed itself to prosecute" and emphasizing that only a prosecutor was "empowered to commit the state to prosecute") (citations and quotation marks omitted). Thus, it appears the Fifth Circuit believed Rothgery could have sat in jail, awaiting indictment, and suffered more of a deprivation of liberty than contemplated in *Argersinger* and its progeny, but not been entitled to counsel to help him challenge his detention—for a crime, it bears emphasizing, he was legally incapable of committing.

[10] *Amici* do not suggest that the right to counsel attaches when

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Some have criticized this Court's criminal procedure jurisprudence as being more protective of the guilty than the innocent. *See* Amar, *supra*, at 644-48. This is a case where an innocent man spent weeks in jail only because he could not afford a lawyer and the state refused to provide him with one. Unless this Court grants review in this case, he will not be the last. The Sixth Amendment should be, and traditionally has been, seen to protect such an innocent person's right to the assistance of counsel in defending his freedom.

This case presents a question that divides the courts and that will not be resolved without action by this Court. The Court should reverse the judgment of the Fifth Circuit and hold that, following a warrantless arrest, the right to counsel attaches at the latest once a judicial determination of probable cause has been made and the government has imposed significant restrictions on a person's liberty.

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a person is admitted to bail if there has not been a judicial determination of probable cause. That is, if a person is admitted to bail by the police following a misdemeanor arrest, required merely to appear before a judge at a later time at which he may be charged, there has been no judicial decision to restrain his liberty. In such a situation, the right to counsel would not have attached. It is the *judicial* determination of probable cause and commitment to jail (or bail) that initiates adversary judicial proceedings, and which therefore causes the right to counsel to attach. Likewise, if the government does not wish to subject the accused to a risk of imprisonment, the right to counsel does not attach (although it should attach if, not being able to make bail, the person is confined). *See Scott*, 440 U.S. at 373-74 (a person has a right to counsel if he may be subject to imprisonment).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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No. 07-440

FILED
JAN 16 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

WALTER ALLEN ROTHGERY,

Petitioner,

v.

GILLESPIE COUNTY, TEXAS,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

The Sixth Amendment right to counsel attaches when "adversary judicial proceedings have been initiated." *Kirby* v. *Illinois*, 406 U.S. 682, 688 (1972). This Court has held that when a defendant is arrested, "arraigned on [an arrest] warrant before a judge," and "committed by the court to confinement," "[t]here can be no doubt . . . that judicial proceedings ha[ve] been initiated." *Brewer* v. *Williams*, 430 U.S. 387, 399 (1977).

In this case, petitioner was arrested and brought before a magistrate judge who informed petitioner of the accusation against him, found probable cause that he had committed the offense based on a police officer's sworn affidavit, and committed him to jail pending trial or the posting of bail. The question presented is whether the Fifth Circuit correctly held—in a decision that conflicts with those of other federal courts of appeals and state courts of last resort—that adversary judicial proceedings nevertheless had not commenced, and petitioner's Sixth Amendment rights had not attached, because no prosecutor was involved in petitioner's arrest or appearance before the magistrate.

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Texas Fair Defense Act, 77th Leg., R.S., ch. 906, 2001 Tex. Gen. Laws 906 42

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Tex. Penal Code § 46.04 4

OTHER AUTHORITIES

Broun, Kenneth S., et al., *McCormick on Evidence* (6th ed. 2006) 25

Butcher, Allan K. & Moore, Michael K., *Muting Gideon's Trumpet: The Crisis in Indigent Criminal Defense In Texas* (Sept. 22, 2000) 42, 43

Dressler, Joshua, *Understanding Criminal Procedure* (3d ed. 2002) 20, 21, 30

TABLE OF AUTHORITIES—Continued

Page(s)

Dripps, Donald A., *Constitutional Theory for Criminal Procedure:* Dickerson, Miranda, *and the Continuing Quest for Broad-But-Shallow*, 43 Wm. & Mary L. Rev. 1 (2001) 41

Gillespie, Glenn C., *Michigan Criminal Law and Procedure* (2007) 23

LaFave, Wayne R., et al., *Criminal Procedure* (2d ed. 1999) ..... *passim*

McDonald, William F., et al., *Police-Prosecutor Relations in the United States* (U.S. Department of Justice, National Institute of Justice 1981) 36

Tomkovicz, James J., *An Adversary System Defense of the Right to Counsel Against Informants: Truth, Fair Play, and the* Massiah *Doctrine*, 22 U.C. Davis L. Rev. 1 (1988) 41

U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Defense Counsel in Criminal Cases* (Nov. 2000) 44

IN THE

Supreme Court of the United States

No. 07-440

WALTER ALLEN ROTHGERY,

Petitioner,

v.

GILLESPIE COUNTY, TEXAS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 491 F.3d 293 (5th Cir. 2007) (Pet. App. 1a-12a). The opinion of the United States District Court for the Western District of Texas is reported at 413 F. Supp. 2d 806 (W.D. Tex. 2006) (Pet. App. 13a-31a).

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). The Court of Appeals entered its judgment on June 29, 2007. The petition for a writ of certiorari

was filed on September 27, 2007, and granted on December 3, 2007.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

U.S. Const. amend. VI. The Sixth Amendment's Assistance of Counsel Clause is applicable to the States through the Fourteenth Amendment. *See Gideon* v. *Wainwright*, 372 U.S. 335, 342-345 (1963).

PRELIMINARY STATEMENT

As this Court has repeatedly held:

> Whatever else it may mean, the right to counsel granted by the Sixth and Fourteenth Amendments means at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him—"whether by way of formal charge, preliminary hearing, indictment, information, or arraignment."

Brewer v. *Williams*, 430 U.S. 387, 398 (1977) (quoting *Kirby* v. *Illinois*, 406 U.S. 682, 689 (1972) (plurality opinion)).

In *Brewer*, this Court held that "[t]here can be no doubt . . . that judicial proceedings had been initiated," and the Sixth Amendment right to counsel had attached, when a defendant was arrested, made an initial appearance before a judge, and was committed to confinement in jail pending trial. 430 U.S. at 399. Subsequently, in *Michigan* v. *Jackson*, 475 U.S. 625 (1986),

the Court reaffirmed that such an initial court appearance "signals 'the initiation of adversary judicial proceedings' and thus the attachment of the Sixth Amendment" right to counsel. *Id.* at 629 (citation omitted); *see also id.* at 629 n.3. As *Jackson* explained, it is at that time—when a court has confronted a defendant with the accusation against him and imposed restrictions on his liberty to ensure that he answers that accusation—that he is transformed from a mere "suspect" to an "accused" within the meaning of the Sixth Amendment, "'faced with the prosecutorial forces of organized society.'" *Id.* at 631-632 (citation omitted).

In this case, petitioner Walter Allen Rothgery was arrested on suspicion of being a felon in possession of a firearm—a charge of which he was innocent, because he was not, in fact, a felon. Rothgery was brought before a magistrate, who informed him of the accusation against him and committed him to custody pending posting of bail or the disposition of the accusation. In short, Rothgery underwent precisely the type of initial court appearance that this Court held in *Brewer* and *Jackson* initiated adversary judicial proceedings and triggered the right to counsel. Rothgery repeatedly requested counsel, but was not appointed an attorney until some six months later, after he had been indicted, rearrested, and jailed. Once appointed, Rothgery's counsel procured the documents that proved his innocence of the charge against him, which was dismissed—but not before he had spent some three weeks in jail on the erroneous charge.

In the decision below, the Fifth Circuit recognized that, in *Brewer* and *Jackson*, this Court had held—without any mention of prosecutorial involvement—that the right to counsel attached at an initial post-arrest appearance before a magistrate. The Fifth Cir-

cuit nevertheless held that Rothgery's right to counsel did not attach at his initial appearance before the magistrate because there was no evidence that any prosecuting attorney was involved in Rothgery's arrest or initial appearance. That "prosecutorial involvement" test cannot be reconciled with this Court's precedent, will prove unworkable in practice, and disserves core Sixth Amendment values. This Court should reverse the decision below.

STATEMENT OF THE CASE

On July 15, 2002, petitioner Walter Allen Rothgery was arrested without a warrant for unlawful possession of a firearm by a felon, a felony under Texas law. *See* Tex. Penal Code § 46.04(a), (e). The police made the arrest on the mistaken belief that Rothgery had been convicted of a felony in California. In fact, the California charges against Rothgery had been dismissed after he completed a diversionary program. SJ Opp. Ex. 2.[1] Rothgery had no felony convictions, and he was thus innocent of the offense for which he was arrested.

The police booked Rothgery into the Gillespie County jail, where he immediately made a written request for the appointment of counsel. SJ Opp. Ex. 3, at 70. Rothgery spent the night in jail. The following morning, he made an initial appearance before a magistrate judge, pursuant to the Texas Code of Criminal Procedure. *See* Tex. Code Crim. Proc. art. 15.17. At that appearance (commonly referred to in Texas as "magistration" or an "Article 15.17 hearing"), the mag-

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[1] The record materials submitted to the district court in support of Rothgery's opposition to Gillespie County's motion for summary judgment (Docket No. 33) are cited as "SJ Opp. Ex. ___."

istrate is required to "inform . . . the person arrested . . . of the accusation against him and of any affidavit filed therewith," along with his rights, including his right to counsel. *Id.*

At Rothgery's magistration, the magistrate was presented with an "Affidavit of Probable Cause" sworn to by the police officer who had arrested Rothgery, "in the name and by the authority of the state of Texas." Pet. App. 33a. The affidavit described the factual basis for the accusation against Rothgery and concluded as follows: "I charge that . . . on or about the 15[th] day of July, 2002, . . . Defendant, Walter A. Rothgery did . . . commit the offense of unlawful possession of a firearm by a felon—3rd degree felony [Penal Code §] 46.04 against the peace and dignity of the state." *Id.* The magistrate signed the affidavit, stating, "I hereby acknowledge that I have examined the foregoing affidavit and have determined that probable cause existed for the arrest of the individual accused therein." *Id.*

As required by Article 15.17, the magistrate informed Rothgery of the accusation against him, telling him: "You are accused of the criminal offense of: unlawful possession of a firearm by a felon which will be filed in . . . District Court." Pet. App. 35a. The magistrate also informed Rothgery of his rights, including his right to have an attorney appointed if he could not afford to hire one. *Id.* at 35a-37a. The magistrate certified that he had communicated that information to "the accused," and Rothgery acknowledged receiving it, by signing a form entitled "Warning by Magistrate." *Id.*

Rothgery had recently lost his job, and although he received veteran's disability and unemployment benefits, he could not afford an attorney. SJ Opp. Ex. 3, at 93-94. He therefore again requested that an attorney

be appointed for him. The magistrate told Rothgery, however, that if he wanted to proceed with the hearing and have his bail set that morning, he would have to waive his right to an attorney for purposes of the hearing. Otherwise, Rothgery would have to wait in jail until an attorney was appointed. *Id.* at 66-67. Rothgery agreed to waive his right to counsel for the limited purpose of allowing the hearing to continue and permitting the magistrate to set bail. *Id.* The magistrate recorded Rothgery's temporary waiver, underlining the words "at this time" on the relevant form to document that Rothgery was waiving only his right to have counsel present at the hearing. *Id.*; Pet. App. 36a.

The magistrate set bail at $5,000, Pet. App. 35a, thus requiring Rothgery to remain in jail pending the posting of bail or the disposition of the accusation against him. *See* Tex. Code Crim. Proc. art. 15.17 (directing magistrate to admit the arrestee to "bail if allowed by law"); *id.* art. 17.27 (providing that if bail is not paid, "the magistrate shall make an order committing the accused to jail to be kept safely until legally discharged").

Following his magistration, Rothgery remained in jail until later that day, when his wife was able to post a surety bond to obtain his release. The surety bond stated that Rothgery "stands charged by complaint duly filed in the Justice of Peace Court" with the felony of unlawful possession of a firearm by a felon, and was conditioned on Rothgery's personal appearance in court. Pet. App. 39a. The bond was "examined" and "approved" by the Sheriff of Gillespie County and was signed by a deputy sheriff. *Id.* at 40a.

After Rothgery was released on bond, he repeatedly inquired about the status of his request for

appointed counsel. SJ Opp. Ex. 3, at 69-70, 81-82. Gillespie County employees informed Rothgery that they could not locate his request. *Id.* at 70-72. On July 24, 2002, Rothgery submitted a new written, notarized request to Gillespie County jail officials for appointment of counsel. *Id.* at 72-74, 76-78. He also made telephone calls—including to employees at the jail, courthouse, and police department—every day for two weeks inquiring about his request. Thereafter, he continued placing calls, but with less frequency. *Id.* at 81-82, 86-87. Despite these efforts, no counsel was appointed. Unbeknownst to Rothgery, Gillespie County followed a policy of not appointing counsel for indigent defendants released on bond until after their first court appearance following information or indictment. SJ Opp. Ex. 7, at 15-17.

On January 17, 2003, a grand jury indicted Rothgery on the charge of being a felon in possession of a firearm. SJ Opp. Ex. 9. Rothgery's bail was increased to $15,000, he was rearrested due to the bail increase, and he was brought before the magistrate, where he renewed his request for counsel. SJ Opp. Ex. 3, at 92-93. Again, no counsel was appointed. Unable to post bail, Rothgery was once more committed to the Gillespie County Jail. Three days later, still with no lawyer, he was transferred to the Comanche County Jail, where he completed another written request for counsel. *Id.* at 95-96.

On January 23, 2003, a lawyer finally was appointed to represent Rothgery. The attorney secured an order reducing Rothgery's bail, which eventually allowed his release after he had served approximately three weeks in jail due to his second arrest. SJ Opp. Ex. 3, at 97-98. The attorney also contacted California authorities and obtained the relevant California records establishing

that Rothgery did not, in fact, have a felony conviction. SJ Opp. Exs. 2, 13. Accordingly, the district attorney moved to dismiss the indictment, and the court dismissed the charge. SJ Opp. Ex. 14.

Rothgery sued respondent Gillespie County under 42 U.S.C. § 1983 on the ground that the County's policy of not appointing counsel for defendants released on bond until after indictment violated his Sixth Amendment right to counsel. Rothgery argued that, under this Court's precedent, his right to counsel attached following his initial appearance before the magistrate, at which he was informed of the accusation against him and required to post bail or be committed to jail. While Rothgery did not contend that he was entitled to counsel at the initial appearance itself, he argued that if counsel had been appointed promptly after that appearance, the mistake underlying his arrest would have been discovered at that time, and he would not have been subject to bond for a lengthy period and wrongfully rearrested and jailed for nearly three weeks.

The district court granted Gillespie County's motion for summary judgment, holding that Rothgery's initial appearance before the magistrate did not constitute the initiation of adversary judicial proceedings and therefore did not trigger his right to counsel. Pet. App. 29a-31a.

The Fifth Circuit affirmed. It observed that this Court has held that the Sixth Amendment right to counsel attaches once "'adversary judicial proceedings have been initiated . . . whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.'" Pet. App. 5a (quoting *Kirby* v. *Illinois*, 406 U.S. 682, 688-689 (1972) (plurality opinion)). Noting that "the ultimate Sixth Amendment conse-

quence[] of certain state procedures is a matter of federal law," *id.* at 6a n.6, it stated that "we do not rely formalistically on the label given to a particular pretrial event when determining the point at which adversary judicial proceedings have been initiated," *id.* at 5a. Drawing on language from this Court's decision in *Kirby*, the Fifth Circuit opined that the inquiry focuses on the time at which "'the government has committed itself to prosecute'" and "'a defendant finds himself faced with the prosecutorial forces of organized society.'" *Id.* at 5a-6a (quoting *Kirby*, 406 U.S. at 689).

The Fifth Circuit noted that it had previously held—in a decision predating this Court's ruling in *Michigan* v. *Jackson*, 475 U.S. 625 (1986)—that the inquiry as to when adversary judicial proceedings commence turns on "'the sometimes elusive degree to which the prosecutorial forces of the state have focused on an individual.'" Pet. App. 6a (quoting *Lomax* v. *Alabama*, 629 F.2d 413, 415 (5th Cir. 1980)). Adhering to that line of reasoning, in another pre-*Jackson* decision, it had held that "a warrantless arrestee's . . . appearance before a magistrate for Article 15.17 warnings did not initiate adversary judicial proceedings, as prosecutors were unaware of and uninvolved in" the arrest and magistration. *Id.* (citing *McGee* v. *Estelle*, 625 F.2d 1206 (5th Cir. 1980)). Following the reasoning of its prior decisions, the Fifth Circuit found no evidence that "prosecutors were . . . aware of or involved in Rothgery's arrest or appearance before the magistrate" and therefore held that Rothgery's appearance before the magistrate did not commence adversary judicial proceedings. *Id.* at 7a.

The Fifth Circuit acknowledged that, in *Brewer* and *Jackson*, this Court had "found adversary judicial proceedings to have been initiated" by an initial post-

arrest appearance before a magistrate "without mentioning whether prosecutors were involved," Pet. App. 7a, but purported to distinguish those cases. As to *Brewer*, it opined that "while the extent of prosecutorial involvement in *Brewer* was unaddressed, it does not appear that the state . . . raised the issue." *Id.* at 8a. And, as to *Jackson*, it reasoned that "the state supreme court opinion preceding *Jackson* establishes that the prosecutor's office approved and issued the complaints and warrants that led to" the defendants' initial appearances—although this Court's opinion in *Jackson* never mentions that fact. *Id.* Accordingly, it concluded that nothing in this Court's decisions in *Brewer* and *Jackson* provided reason "enough for us to ignore our binding authority." *Id.*[2]

SUMMARY OF ARGUMENT

This Court has repeatedly held that a defendant's initial appearance before a magistrate, who informs him of the accusation against him and commits him to custody to ensure that he answers that accusation, marks the commencement of adversary judicial proceedings

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[2] The Fifth Circuit went on to reject the argument that its prior holding in *McGee* was distinguishable because the police officer's affidavit presented at Rothgery's initial appearance before the magistrate constituted a "complaint" or other "formal charge" that itself initiated adversary judicial proceedings. Pet. App. 8a-12a. The Fifth Circuit declined to resolve the issue whether the affidavit was a "complaint" as a matter of state law, instead concluding that, regardless of the answer to "the formalistic question of whether the affidavit here would be considered a 'complaint' or its functional equivalent under Texas . . . law," *id.* at 11a, it could not initiate adversary judicial proceedings, because no prosecutor was aware of or involved in the preparation of the affidavit or the ensuing appearance, *id.* at 12a.

and thus the attachment of the Sixth Amendment right to counsel. That settled principle controls this case. Rather than applying that principle, however, the Fifth Circuit held that the right to counsel attaches following such an initial appearance only if the defendant can show that a prosecutor was aware of or involved in the appearance or the underlying arrest. That holding cannot be reconciled with this Court's precedent.

In *Kirby* v. *Illinois*, 406 U.S. 682 (1972), this Court set out a clear test to determine when a "criminal prosecution[]" within the meaning of the Sixth Amendment begins, and the right to counsel attaches: upon "the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." *Id.* at 689 (plurality opinion). Applying the test articulated in *Kirby*, this Court held in *Brewer* v. *Williams*, 430 U.S. 387 (1977), that there could "be no doubt . . . that judicial proceedings had been initiated" where the defendant had been arrested, "arraigned on [the arrest] warrant before a judge," and "committed by the court to confinement." *Id.* at 399. This Court reaffirmed *Brewer* in *Michigan* v. *Jackson*, 475 U.S. 625 (1986), unequivocally holding that an initial post-arrest "arraignment" at which the defendant is informed of the accusation against him and committed to custody "signals 'the initiation of adversary judicial proceedings.'" *Id.* at 629.

Rothgery's initial appearance before a magistrate was identical in every meaningful way to the initial "arraignments" in *Brewer* and *Jackson*. Rothgery was brought before a magistrate, who informed Rothgery that he was "accused" of the "criminal offense" of unlawful possession of a firearm by a felon, informed him of his statutory and constitutional rights, and re-

quired that he post bail or remain in jail to ensure that he appeared to answer that accusation. Pet. App. 33a, 35a. There can be no doubt that, as in *Brewer* and *Jackson*, following that initial appearance, Rothgery was transformed from a mere "suspect" into an "accused" whose Sixth Amendment right to counsel had attached. *Jackson*, 475 U.S. at 632.

The Fifth Circuit purported to distinguish *Brewer* and *Jackson* on the ground that no prosecutor was aware of or involved in Rothgery's arrest or initial appearance before the magistrate. While acknowledging that neither *Brewer* nor *Jackson* made any mention of prosecutorial involvement, the Fifth Circuit nevertheless construed this Court's holdings to depend on that factor. But neither case even hinted that a prosecutor's involvement was relevant to the analysis; rather, both focused squarely on the nature and consequences of the judicial proceedings at issue—neither of which is affected in any way by the involvement of a prosecuting attorney. Under this Court's reasoning in *Brewer* and *Jackson*, the involvement of a prosecutor can make no practical, or constitutional, difference to the attachment of a defendant's right to counsel.

Nor is the Fifth Circuit's prosecutorial involvement test consistent with the reasoning of *Kirby*. While the Fifth Circuit invoked *Kirby*'s statement that the initiation of judicial criminal proceedings is significant because it is at that time that the accused faces "the prosecutorial forces of organized society," Pet. App. 5a-6a (quoting *Kirby*, 406 U.S. at 689), neither *Kirby* nor any subsequent decision of this Court has indicated that the initiation of judicial criminal proceedings require the involvement of a prosecutor. Like *Brewer* and *Jackson*, *Kirby* focused on *whether* such proceedings had been initiated, not *by whom*. The Fifth Cir-

cuit's fact-dependent prosecutorial involvement test thus cannot be reconciled with *Kirby*'s clear and objective rule. Once a defendant has been brought before a judge who has informed him of the accusation against him and committed him to jail or bail pending resolution of that accusation, the defendant is confronted with "the prosecutorial forces of organized society" in every meaningful sense of the phrase, and judicial criminal proceedings have plainly commenced.

The Fifth Circuit's prosecutorial involvement test is not only inconsistent with this Court's precedent, but unworkable in practice. The straightforward, objective test set out in *Kirby*, *Brewer*, and *Jackson* looks to the nature of the proceedings that have taken place—an easily ascertainable matter of public record. By contrast, the Fifth Circuit's approach requires a fact-intensive inquiry into what prosecutors knew, when they knew it, and the extent of their involvement in pretrial proceedings. Having the attachment of the right to counsel turn on such an inquiry would unnecessarily tax judicial resources, put an unfair burden on an uncounseled defendant to prove his entitlement to counsel through an evidentiary showing, and require intrusive investigation into prosecutorial communications and deliberations that may be subject to statutory and common-law privileges.

Finally, the Fifth Circuit's rule would work substantial injustice to indigent defendants—particularly those who, like Rothgery, are innocent of the charges against them. Under that rule, such defendants could spend months in jail, awaiting indictment, solely because they lack the skill to demonstrate their innocence and the funds to hire counsel to assist them. That outcome offends the core guarantee of the Sixth Amendment.

ARGUMENT

I. THIS COURT'S PRECEDENT ESTABLISHES THAT ROTHGERY'S RIGHT TO COUNSEL ATTACHED FOLLOWING HIS INITIAL APPEARANCE BEFORE THE MAGISTRATE

A. The Sixth Amendment Right To Appointed Counsel Attaches Upon The Commencement Of Adversary Judicial Proceedings

This Court has long recognized that the right to appointed counsel is a cornerstone of our criminal justice system. As long ago as *Powell* v. *Alabama*, 287 U.S. 45 (1932), this Court held that it would violate due process to try an indigent defendant, at least in a capital case, without providing counsel to assist in his defense. As the Court there observed:

> Even the intelligent and educated layman has small and sometimes no skill in the science of law. . . . Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence . . . . He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.

Id. at 69. Focusing on these same concerns, in *Johnson* v. *Zerbst*, 304 U.S. 458 (1938), this Court held that the Sixth Amendment "withholds from federal courts, in all criminal proceedings, the power and authority to deprive an accused of his life or liberty unless he has or waives the assistance of counsel." *Id.* at 463.

In *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), the Court held that the Sixth Amendment right to counsel is binding on the States through the Fourteenth Amendment's due process clause, observing: "[I]n our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth." *Id.* at 344. As the Court explained, the fundamental guarantee of our criminal justice system that "every defendant stands equal before the law" "cannot be realized if the poor man charged with a crime has to face his accusers without a lawyer to assist him." *Id.* Indeed, as the Court subsequently observed, "[o]f all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have." *United States* v. *Cronic*, 466 U.S. 648, 654 (1984) (citation and internal quotation marks omitted).

It has also long been settled that the right to appointed counsel necessarily arises prior to the trial itself. *See, e.g., Maine* v. *Moulton*, 474 U.S. 159, 170 (1985). In *Powell*, for example, counsel was appointed to represent the defendants on "the very morning of the trial." 287 U.S. at 56. The Court held that such delay violated the fundamental requisites of due process:

> [D]uring perhaps the most critical period of the proceedings . . . from the time of their arraignment until the beginning of their trial, when consultation, thorough-going investigation and preparation were vitally important, the defendants did not have the aid of counsel . . . although they were as much entitled to such aid during that period as at the trial itself.

Id. at 57. Indeed, "to deprive a person of counsel during the period prior to trial may be more damaging than denial of counsel during the trial itself." *Moulton*, 474 U.S. at 170.

In *Kirby* v. *Illinois*, 406 U.S. 682 (1972), this Court articulated a clear, objective test to determine when the right to counsel attaches: following "the initiation of adversary judicial criminal proceedings." *Id.* at 689 (plurality opinion).[3] Because state criminal procedures vary, such proceedings can commence in a variety of ways—"by way of formal charge, preliminary hearing, indictment, information, or arraignment." *Id.* But, whatever terminology a State employs, and however judicial criminal proceedings begin in a particular case, the right to counsel attaches as soon as they do. *See id.*

Under *Kirby*, the attachment of the right to counsel thus turns not on a State's characterization of the proceedings the defendant is required to undergo, but on the very fact that judicial proceedings have commenced, placing the defendant in an adversarial relationship with the State:

> The initiation of judicial criminal proceedings is far from a mere formalism. It is the starting

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[3] *Kirby* used interchangeably the phrases "adversary judicial proceedings," 406 U.S. at 688, "adversary judicial criminal proceedings," *id.* at 689, and "judicial criminal proceedings," *id.* Subsequent cases citing *Kirby* have also used those phrases, and similar phrases, interchangeably. *See, e.g., Brewer* v. *Williams*, 430 U.S. 387, 398, 399 (1977) ("judicial proceedings"); *Michigan* v. *Jackson*, 475 U.S. 625, 629 n.3 (1986) ("formal legal proceedings"). The import of all these phrases, however, is the same: as the Court subsequently put it, the "right to counsel attaches at the first formal proceeding against an accused." *McNeil* v. *Wisconsin*, 501 U.S. 171, 180-181 (1991).

> point of our whole system of adversary criminal justice. For it is only then that the government has committed itself to prosecute, and only then that the adverse positions of government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law.

406 U.S. at 689. It is at that point, *Kirby* held, that a "criminal prosecution[]" within the meaning of the Sixth Amendment begins, and the protections of the Sixth Amendment therefore apply from that point forward. *See id.* at 689-690.[4]

Despite *Kirby*'s clear language indicating that the right to counsel attaches prior to indictment if the defendant undergoes pre-indictment judicial proceedings such as a preliminary hearing, some courts interpreted *Kirby* to hold that the right attached only upon indict-

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[4] By contrast, when the police are merely investigating a crime and "judicial criminal proceedings" have not yet commenced, the right to counsel has not attached. Thus, because the suspect in *Kirby* had merely been arrested and taken to the police station for a show-up identification, and had not yet undergone any judicial proceedings, his right to counsel had not yet arisen. *See* 406 U.S. at 684-685, 690. Similarly, in *United States* v. *Gouveia*, 467 U.S. 180 (1984), the Court held that the right to counsel did not attach prior to the initiation of adversary judicial proceedings simply because prison inmates were held in administrative detention while prison authorities investigated allegations that they had committed offenses while in prison. *See id.* at 182-184, 187; *see also Moran* v. *Burbine*, 475 U.S. 412, 415-418, 432 (1986) (post-arrest interrogation that concededly took place before initiation of judicial criminal proceedings did not violate Sixth Amendment right to counsel).

ment. In *Moore* v. *Illinois*, 434 U.S. 220 (1977), this Court rejected that reading of *Kirby* and reaffirmed that the right to counsel attaches as soon as judicial criminal proceedings begin, even if that is prior to indictment. *See id.* at 228 (holding that the defendant's right to counsel had attached by the time of his first court appearance, a preliminary hearing to determine probable cause to bind defendant over to a grand jury and set bail).

Indeed, as discussed further below, this Court has never subsequently questioned *Kirby*'s holding that "the initiation of judicial criminal proceedings" is a bright line after which the right to counsel attaches. Rather, the Court has consistently affirmed that the "Sixth Amendment right to counsel attaches at the first formal proceeding against an accused." *McNeil* v. *Wisconsin*, 501 U.S. 171, 180-181 (1991). In every case it has considered in which a court has informed the defendant of the accusation against him and imposed restrictions on his liberty to ensure that he answers that accusation—whether the defendant's court appearance was an arraignment upon an indictment or information, a preliminary hearing, or an initial appearance or "arraignment" following arrest—the Court has found that the right to counsel attached at least as early as that judicial proceeding.[5]

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[5] *See Brewer*, 430 U.S. at 399 (initial arraignment following arrest); *Moore*, 434 U.S. at 222, 228 (preliminary hearing that was first court appearance following arrest); *Moulton*, 474 U.S. at 162, 170 (arraignment on indictment); *Jackson*, 475 U.S. at 629 & n.3 (initial arraignment following arrest); *see also McNeil*, 501 U.S. at 173, 175 (accepting as undisputed that right attached at initial appearance before county court commissioner following arrest).

As this Court has explained, that rule comports with both the language and purpose of the Sixth Amendment. It recognizes that a "criminal prosecution[]" commences, and a person becomes an "accused," within the meaning of the Sixth Amendment as soon as "the government's role shifts from investigation to accusation." *Moran* v. *Burbine*, 475 U.S. 412, 430 (1986). That shift unquestionably has taken place by the time that a court has confronted the defendant with the accusation against him and imposed restrictions on his liberty to ensure that he answers that accusation. Once that has occurred, a defendant requires the assistance of counsel in order to negotiate the criminal process and understand and invoke his rights. *See Cronic*, 466 U.S. at 654. And, at that point, a defendant requires counsel to ensure, not only that he is not wrongly convicted, but also that he is not detained and "put on trial without a proper charge." *Powell*, 287 U.S. at 69.[6]

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[6] This Court has held both that the right to counsel attaches upon the commencement of adversary judicial proceedings, *see, e.g.*, *Brewer*, 430 U.S. at 398 ("Whatever else it may mean, the right to counsel . . . means at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him."), and that once the right has attached, the defendant is entitled to have counsel present at all "critical stages" of the proceedings, *see, e.g.*, *United States* v. *Wade*, 388 U.S. 218, 226-227, 236-237 (1967) (post-indictment, pretrial lineup is a "critical stage" at which "[t]he presence of counsel" is required "to assure that the accused's interests will be protected"). This Court has made clear that these two inquiries are separate: "The question whether arraignment signals the initiation of adversary judicial proceedings" and thus the point in time after which the right to counsel attaches "is distinct from the question whether the arraignment itself is a critical stage requiring the presence of counsel." *Jackson*, 475 U.S. at 629 n.3. The question presented by this case and decided by the Fifth Circuit is the former: whether

B. This Court Has Held That Adversary Judicial Proceedings Commence When A Defendant Appears Before A Judge Who Informs Him Of The Accusation Against Him And Commits Him To Custody

In applying the test set out in *Kirby*, this Court has repeatedly made clear that adversary judicial proceedings commence, and the Sixth Amendment right to counsel attaches, when—as occurred here—an arrested person makes an initial appearance before a judge who informs him of the accusation against him and requires him to remain in jail or post bail to ensure that he answers that accusation.

"All jurisdictions require that an arrestee held in custody be brought before the magistrate court" for an initial appearance "in a fairly prompt fashion," generally within 24 to 48 hours. Wayne R. LaFave et al., 1 *Criminal Procedure* § 1.3(k), at 114 (2d ed. 1999) ("LaFave"). The term for this first court appearance varies: jurisdictions variously call it a "first appearance," "initial appearance," "preliminary appearance," "initial presentment," "initial arraignment," "preliminary arraignment," "arraignment on the warrant," or "arraignment on the complaint." *Id.* at 113; Joshua Dressler, *Understanding Criminal Procedure* § 1.03, at

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Rothgery's initial appearance before the magistrate marked the commencement of adversary judicial proceedings, after which his right to counsel attached. Rothgery does not contend here that he was entitled to the presence of counsel at the initial appearance itself. *See also* Pet. App. 5a n.5 (noting that Gillespie County had not raised any critical-stage argument and declining to consider any such argument).

8 (3d ed. 2002) ("Dressler").[7] As noted above, in Texas such an initial appearance is commonly referred to as "magistration" or an "Article 15.17 hearing."

At this initial appearance or "arraignment," the magistrate will provide the defendant with notice of the accusation against him and advise him of his rights. LaFave, § 1.3(k), at 114. In felony and serious misdemeanor cases, the magistrate will typically inform the defendant of the right to court-appointed counsel if he is indigent, and if the defendant requests counsel, the magistrate will generally initiate the process of appointing counsel. *Id.* at 114-115. At the initial appearance, the magistrate will also determine whether to set bail, and, if so, what conditions to impose to ensure that the defendant will make court appearances through the completion of the proceedings. *Id.* at 116-117; Dressler, § 1.03, at 8; *id.* § 30.01, at 635.

In *Brewer* v. *Williams*, 430 U.S. 387 (1977), this Court held that such an initial appearance marked the commencement of adversary judicial proceedings under *Kirby*. There, the defendant, Williams, turned himself in to the police after a warrant was issued for his arrest. The next day, he was "arraigned" before a judge on the arrest warrant, advised of his *Miranda* rights, and committed to jail. *Id.* at 391.[8] After that initial

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[7] This type of initial "arraignment" must be distinguished from a later proceeding, also termed an "arraignment," that occurs after an indictment or information is filed, and at which the defendant is required to enter a plea. LaFave, § 1.3(k), at 113 & n.176, 124.

[8] In *Brewer*, Williams had not yet been indicted and was not asked to enter a plea when he made his initial appearance before the court. *See* 430 U.S. at 391-393; *see also State* v. *Williams*, 182 N.W.2d 396, 398-399 (Iowa 1970) (noting that Williams was not

proceeding, the police elicited incriminating statements from Williams during a long automobile ride, although Williams had indicated that he did not want to speak to the police until he saw his attorney. *See id.* at 391-392. Those statements were introduced at trial, and the jury found Williams guilty of murder. *See id.* at 394.

This Court held that those incriminating statements were admitted in violation of Williams' Sixth Amendment right to counsel. *See Brewer*, 430 U.S. at 397-398, 406. It explained that the defendant has a "vital need at the pretrial stage," no less than at trial, for the assistance of counsel. *Id.* at 398. Reiterating the rule of *Kirby*, the Court declared that it was "well established" that "[w]hatever else it may mean, the right to counsel . . . means at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him." *Id.*

Applying that rule to Williams' case, the Court held that his initial court appearance marked the commencement of judicial proceedings against him and triggered his right to counsel:

> There can be no doubt in the present case that judicial proceedings had been initiated against Williams before the start of the automobile ride . . . . A warrant had been issued for his arrest, he had been arraigned on that warrant before a judge . . . , and he had been committed by the court to confinement in jail.

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indicted until February 1969, well after his initial "arraignment" took place in December 1968). This Court noted in *Brewer* that Williams was arraigned on a "warrant," 430 U.S. at 391, 399, indicating that the term "arraignment" referred to the same type of initial court appearance that occurred in this case.

Brewer, 430 U.S. at 399.

This Court reached the same conclusion in *Michigan* v. *Jackson*, 475 U.S. 625 (1986), which consolidated two cases (*Jackson* and *Bladel*) from the Michigan Supreme Court. In both cases, the defendants were arrested, arraigned before a judge, and committed to jail pending further proceedings. *See id.* at 627-628. As in *Brewer*, the arraignments at issue were initial appearances before a magistrate. At such an appearance, a defendant is informed of the accusation against him and his constitutional rights, including the right to counsel, and is committed to jail or released on bond.[9]

The nature of the arraignments in *Jackson* was discussed in the State's brief in *Bladel*. The State noted that "arraignment" was an ambiguous term, and it took pains to clarify that defendant Bladel's arraignment was an "initial arraignment," which was required to take place promptly after arrest, and was distinct from a "second arraignment" in Michigan procedure, "at which time defendant has his first opportunity to enter a plea." Brief for Petitioner, *Michigan* v. *Bladel*, No. 84-1539, 1985 WL 669876, at 24-26 (July 10, 1985). The

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[9] *See* 1A Glenn C. Gillespie, *Michigan Criminal Law and Procedure* § 16:1 (2007) (explaining that "arraignment on the warrant [in Michigan] . . . is the first appearance by the defendant in the case" and provides "formal notice of the charge against the accused; the magistrate informs the accused of the right to counsel and inquiry is made to determine whether the defendant is in need of appointed counsel . . . and the arraigning judge may fix bail"); *see also Owen* v. *State*, 596 So. 2d 985, 989 & n.7 (Fla. 1992) (noting that when this Court stated in *Jackson* that the right to counsel attaches at "arraignment," it was using the term in the "initial appearance" sense).

State argued that the right to counsel should not attach at such an "initial arraignment."

This Court flatly rejected that argument, terming it "untenable." *Jackson*, 475 U.S. at 629 n.3. Rather, it held unequivocally that such an initial "arraignment," at which a defendant is informed of the accusation against him and committed to jail or bail, "signals 'the initiation of adversary judicial proceedings' and thus the attachment of the Sixth Amendment." *Id.* at 629. As the *Jackson* Court explained, it is at that time that "a person who had previously been just a 'suspect' has become an 'accused' within the meaning of the Sixth Amendment," *id.* at 632, and therefore "'finds himself faced with the prosecutorial forces of organized society,'" *id.* at 631 (quoting *Kirby*, 406 U.S. at 689).

Since its decision in *Jackson*, this Court has never questioned the proposition that, once a defendant has appeared before a magistrate, has been informed of the accusation against him, and has been committed to jail or bail, adversary judicial proceedings have commenced. In *McNeil*, for example, the Court reiterated that the "right to counsel attaches at the first formal proceeding against an accused," 501 U.S. at 180-181, and noted that it was undisputed that petitioner's initial appearance before a county court commissioner, who set bail and scheduled a preliminary hearing, triggered his right to counsel, *see id.* at 173, 175.

Lower courts and commentators have likewise read *Brewer* and *Jackson* to establish that such an initial appearance—regardless of the name the State gives it—marks the commencement of adversary judicial proceedings. As the Florida Supreme Court explained: "[T]he [U.S. Supreme] Court and commentators are in agreement that [adversary judicial] proceedings clearly

have begun when an accused is placed in custody, haled before a magistrate on a warrant or formal complaint, and then tentatively charged with a particular crime at this initial appearance or 'arraignment.'" *Owen* v. *State*, 596 So. 2d 985, 988-989 (Fla. 1992) (footnotes omitted); *see also* 1 Kenneth S. Broun et al., *McCormick on Evidence* § 154, at 622-623 (6th ed. 2006) ("In *Michigan* v. *Jackson*, the Court held that an 'arraignment,' by which it apparently meant an arrested person's post-arrest appearance before a judicial officer, does trigger the Sixth Amendment right. In most situations, this post-arrest appearance will be the definitive point.").

The Sixth Circuit reached the same conclusion in *Mitzel* v. *Tate*, 267 F.3d 524 (6th Cir. 2001), holding that, as in *Brewer*, there could be "no doubt" that adversary judicial proceedings had commenced when the defendant "had been placed under arrest, the police had issued a complaint against him detailing the essential facts of the offense with which he was charged, and he had appeared before a state judge" who "ordered that his confinement in jail continue." *Id.* at 532. Similarly, in *Fleming* v. *Kemp*, 837 F.2d 940 (11th Cir. 1988), the Eleventh Circuit expressly rejected the argument that an initial post-arrest appearance before a justice of the peace, who informed the defendant of the accusation against him and committed him to custody, did not trigger the right to counsel because it was not a "formal arraignment." Rather, *Fleming* held, under *Jackson*, the initial appearance commenced adversary judicial

proceedings and triggered the right to counsel. *Id.* at 948.[10]

The holding of *Brewer* and *Jackson* makes eminent sense. As the Court in *Jackson* observed, the defendant's initial court appearance marks the point at which he is no longer merely a suspect under investigation by the police, but an accused against whom the full authority of the State has been brought to bear. Such a defendant is subject to all the deleterious consequences of pending criminal charges, including state-imposed deprivation of liberty, potentially for extended periods, while the accusation against him is resolved. At that point—once a court has informed the defendant that he is accused of a crime and has restricted his liberty to ensure that he answers the accusation against him—his right to counsel has attached.

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[10] *See also, e.g., Matteo* v. *Superintendent, SCI Albion*, 171 F.3d 877, 893 (3d Cir. 1999) (holding that defendant's right to counsel attached when he was arrested, brought before a judge for "preliminary arraignment," and committed to jail); *Stokes* v. *Singletary*, 952 F.2d 1567, 1579 (11th Cir. 1992) (relying on *Brewer* and *Jackson* to hold that defendant's right to counsel had attached after arrest and an initial appearance before a magistrate); *Bradford* v. *State*, 927 S.W.2d 329, 333-335 (Ark. 1996) (finding that, under *Jackson*, the right to counsel attached after a defendant was arrested, was brought before a municipal court judge, and had bond set); *State* v. *Barrow*, 359 S.E.2d 844, 846, 848 (W. Va. 1987) (relying on *Jackson* to hold that the right to counsel attached when the defendant was arrested and made an initial appearance before a magistrate who committed him to custody).

C. Rothgery's Initial Appearance Before The Magistrate Was Functionally Identical To The Proceedings In *Brewer* And *Jackson*

Under this Court's precedent, there can be no doubt that adversary judicial proceedings commenced, and Rothgery's Sixth Amendment right to counsel attached, following his initial appearance before the magistrate on July 16, 2002. At that hearing, the magistrate apprised Rothgery of the accusation against him and committed him to custody pending the posting of bond or resolution of the accusation. It was thus precisely the type of initial court appearance that *Brewer* and *Jackson* held marks the initiation of adversary judicial proceedings.

1. The initial appearance before the magistrate prescribed by Texas law, and which Rothgery underwent on July 16, 2002, is substantially the same kind of initial appearance that takes place across the country. As discussed above, *see supra* pp. 4-6, the Texas Code of Criminal Procedure sets out the requisites of that initial appearance. The magistrate must "inform . . . the person arrested . . . of the accusation against him and of any affidavit filed therewith." Tex. Code Crim. Proc. art. 15.17(a). The magistrate must also inform the arrestee of his rights, including his "right to request the appointment of counsel if [he] cannot afford counsel," and his right to request an "examining trial." *Id.*[11]

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[11] An "examining trial" is the name Texas gives to what other jurisdictions typically call a "preliminary hearing." Tex. Code Crim. Proc. art. 16.01. In almost all jurisdictions, a felony defendant is entitled to such a hearing before the magistrate, held after the initial appearance but prior to indictment. LaFave, § 1.3(*l*), at 118-119. Under Texas procedure, if a defendant invokes the right to an examining trial—an evidentiary hearing at which the defen-

In addition, Article 15.17 directs the magistrate to "admit the person arrested to bail if allowed by law," *id.*; if the defendant cannot pay the bail set, he is committed to jail, *see id.* art. 17.27.

At Rothgery's initial appearance, the magistrate was presented with a sworn "Affidavit of Probable Cause," executed by the police officer who arrested Rothgery "in the name and by the authority of the state of Texas," "charg[ing] that . . . Rothgery . . . commit[ted] the offense of unlawful possession of a firearm by a felon." Pet. App. 33a. Based on the affidavit, the magistrate informed Rothgery that he was "accused of the criminal offense of unlawful possession of a firearm by a felon." *Id.* at 35a. He also informed Rothgery of his right to appointed counsel and his right to an examining trial. *Id.* Finally, he set bail of $5,000 to ensure that Rothgery answered the accusation against him. *Id.*; *see* Tex. Code Crim. Proc. art. 17.01 ("'Bail' is the security given by the accused that he will appear and answer before the proper court the accusation brought against him[.]").

The consequence of Rothgery's initial appearance before the magistrate, accordingly, was that he stood accused of a felony offense (an offense he had not committed). A court had formally apprised him of that accusation and had imposed restrictions on his liberty to ensure his appearance at subsequent proceedings to answer that accusation. Rothgery's status as an "ac-

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dant may call and cross-examine witnesses, Tex. Code Crim. Proc. arts. 16.06, 16.07—the magistrate will "examine . . . the truth of the accusation made," *id.* art. 16.01. If the magistrate finds no probable cause for the accusation, the defendant is discharged. *Id.* art. 16.17.

cused" was made plain not only by the magistrate's informing him in clear terms that he was accused of a crime, but also by the rights that, under Texas law, accrued to him following magistration—for example, the right to an examining trial to contest the validity of the charge against him. From this point forward, he required the assistance of counsel to navigate the criminal proceedings (for instance, to make an informed decision whether to assert his right to an examining trial, something he could hardly be expected to do without the assistance of counsel, *see Cronic*, 466 U.S. at 654) and to prove his innocence of the erroneous accusation against him.

Rothgery's initial appearance before the magistrate was thus substantively identical to the arraignments that took place in *Brewer* and *Jackson*. At each of those hearings, the defendant was brought before a judicial officer who informed him of the accusation against him and committed him to custody to ensure that he would answer that accusation. *See Brewer*, 430 U.S. at 399; *Jackson*, 475 U.S. at 629 & n.3; *see also supra* note 9 (explaining procedure for Michigan initial arraignments at issue in *Jackson*). Accordingly, as in *Brewer* and *Jackson*, the initial appearance before a judge transformed Rothgery from a "suspect" to an "accused," marked the initiation of adversary judicial proceedings, and triggered his right to counsel.

2. The Fifth Circuit purported to distinguish *Brewer* and *Jackson* in part on the ground that the defendants in those cases were "arraigned on an arrest warrant," while Rothgery was arrested without a warrant. Pet. App. 7a. But Rothgery's warrantless arrest does not make his initial appearance before the magistrate any different from the arraignments at issue in *Brewer* and *Jackson*.

As an initial matter, one of the two defendants in *Jackson*—like Rothgery—was arrested *without* a warrant. *See People* v. *Bladel*, 365 N.W.2d 56, 70 (Mich. 1984) ("[D]efendant [Jackson] was arrested for a felony without a warrant[.]"). While the police obtained the prosecutor's approval for a warrant after Jackson's arrest and just before his initial court appearance, *see id.* at 72, that appearance was nonetheless substantively identical to Rothgery's: it served to validate Jackson's arrest, as well as to inform him of the charges against him and commit him to custody.

In any event, the constitutional significance of a defendant's initial appearance cannot turn on the happenstance of whether he was arrested with or without a warrant. The only difference between the two situations is that, in the case of a warrantless arrest, in many jurisdictions the magistrate will also determine at the initial appearance whether probable cause existed for the arrest. As this Court has held, the Fourth Amendment requires, as a "prerequisite to extended restraint of liberty" pursuant to a warrantless arrest, a prompt determination by a magistrate that probable cause supported the arrest. *Gerstein* v. *Pugh*, 420 U.S. 103, 114 (1975). Absent exceptional circumstances, that determination must take place within 48 hours of arrest. *See County of Riverside* v. *McLaughlin*, 500 U.S. 44, 56 (1991). Many jurisdictions—including Texas—combine the *Gerstein* probable-cause determination with the initial appearance for the sake of convenience. *See* Tex. Code Crim. Proc. arts. 14.06(a), 15.17 (requiring that a person arrested without a warrant be brought before a magistrate within 48 hours for the same magistration that occurs when a person is arrested with a warrant); *see also* LaFave, § 1.3(k), at 114 & n.179; Dressler, § 1.03, at 7-8; *Riverside*, 500 U.S. at

54 (noting that the 48-hour limit allows States to combine *Gerstein* determinations with other pretrial proceedings, such as an "arraignment" or a "bail hearing").

But the incorporation of a *Gerstein* determination into an initial appearance in no way alters the function or effect of the initial appearance itself: to inform the arrestee of the accusation against him and impose whatever restrictions on his liberty are necessary to ensure that he answers that accusation. Because that occurred here, there can be no question that—just as in *Brewer* and *Jackson*—Rothgery's initial appearance before the magistrate transformed him from a mere "suspect" to an "accused" within the meaning of the Sixth Amendment, *Jackson*, 475 U.S. at 632, and his right to counsel had attached.

II. The Court Of Appeals' Prosecutorial Involvement Test Cannot Be Reconciled With This Court's Precedent

The Fifth Circuit did not dispute that, in both *Brewer* and *Jackson*, this Court held that adversary judicial proceedings commenced when a defendant was arrested, made an initial appearance before a judge who informed him of the charges against him, and was committed to confinement. And the Fifth Circuit acknowledged that neither *Brewer* nor *Jackson* mentioned "prosecutorial involvement," let alone suggested that such involvement was necessary to this Court's holdings in those cases. Pet. App. 7a. It nevertheless concluded that, as a matter of federal constitutional law, pre-indictment judicial proceedings cannot trigger the right to counsel absent a prosecutor's awareness or involvement. *Id.* at 6a-8a. That rule cannot be reconciled either with this Court's precedent on the specific

question here or with the more general Sixth Amendment principles this Court has articulated.

A. The Fifth Circuit's Analysis Cannot Be Squared With *Brewer* And *Jackson*

The Fifth Circuit's efforts to distinguish *Brewer* and *Jackson* do not bear scrutiny. *Brewer* expressly held, without any mention of prosecutorial involvement, that "[t]here can be no doubt . . . that judicial proceedings had been initiated," pursuant to the rule in *Kirby*, when the defendant had been arrested, "arraigned on [the arrest] warrant before a judge," and "committed by the court to confinement in jail." 430 U.S. at 399. The Fifth Circuit commented that "it does not appear that the state contested [in *Brewer*] that adversary judicial proceedings had begun." Pet. App. 8a. But this Court did not rest its decision on a concession by the State; rather, it explicitly held that adversary judicial proceedings had in fact commenced and the Sixth Amendment right to counsel had in fact attached—while making no mention of any prosecutorial involvement in the arrest or arraignment. 430 U.S. at 399. The dispositive fact in *Brewer* was not that a prosecutor was involved in the arrest or arraignment—again, the decision nowhere states whether that was the case—but that the defendant had made an initial appearance before a court, which committed him to confinement to ensure he answered the accusation against him.[12]

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[12] As one treatise on criminal procedure has observed, "[I]t is noteworthy that at no point [in *Brewer*] does the Court deem it necessary to discuss the circumstances behind the issuance of the complaint and warrant[.]" LaFave, § 6.4(e), at 487. Rather, *Brewer* apparently reasoned that, "whatever the reasons underly-

In *Jackson*, this Court again held that it was "clear" that adversary judicial proceedings had been initiated after the two defendants in that case were arrested and made initial appearances before a judge that were functionally identical to Rothgery's initial appearance before the magistrate. *See* 475 U.S. at 629 & n.3 (citing, among other cases, *Kirby* and *Brewer*). Like *Brewer*, *Jackson* nowhere suggested that a prosecutor was aware of or involved in the arrests or initial appearances, or that such involvement carried any weight in the Court's determination that adversary judicial proceedings had commenced. While the Fifth Circuit stated that the "[Michigan] supreme court opinion preceding *Jackson* establishes that the prosecutor's office approved and issued the complaints and warrants that led to the arraignment," Pet. App. 7a-8a (citing *Bladel*, 365 N.W.2d at 71-72), this Court never mentioned—let alone relied on—this fact in reaching its holding that the defendants' "arraignment 'signal[ed] the initiation of adversary judicial proceedings.'" 475 U.S. at 629 (citation omitted). The only reasonable conclusion is that *Jackson*'s holding that adversary judicial proceedings had commenced depended not on a prosecutor's involvement, but instead on the factor the Court *did* identify—the defendants' initial arraignments before a magistrate, at which they were informed of the accusations against them and committed to custody.[13]

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ing the complaint-warrant process, at least from the time [the] defendant is brought into court and arraigned on the warrant . . . the Sixth Amendment right to counsel applies." *Id.*

[13] In *Moulton*, this Court rejected the mode of analysis employed by the Fifth Circuit here, making clear that this Court's opinions—not those of the courts below—set out the facts upon which its holdings turn. There, the government had argued that

Indeed, other courts that have addressed the question have understood *Brewer* and *Jackson* to foreclose any "prosecutorial involvement" test of the kind adopted by the Fifth Circuit here. For instance, in *State* v. *Jackson*, 380 N.W.2d 420 (Iowa 1986), the Iowa Supreme Court expressly rejected the State's argument that a defendant's right to counsel did not attach at his initial appearance because there was "no participation by a prosecuting attorney in the proceedings," *id.* at 423, concluding that the initial appearance itself sufficiently evidenced "the State's commitment to prosecute," *id.* at 424. The court observed that the case was "indistinguishable in principle from *Brewer*," where "no participation by a prosecuting attorney was shown." *Id.*

Similarly, before this Court's decision in *Jackson*, the Georgia Supreme Court had held that the right to counsel did not attach at an initial appearance before a magistrate at which no prosecutor was present. *See Ross* v. *State*, 326 S.E.2d 194 (Ga. 1985). After *Jackson*, the court recognized that the holding of *Ross* could no longer stand, and overruled it, holding that, under *Jackson*, the "Sixth Amendment right to counsel attaches at an initial appearance hearing" regardless of

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the holding of *Massiah* v. *United States*, 377 U.S. 201 (1964), applied only when the police, rather than an informant, set up the meeting at which incriminating statements were elicited from the defendant. Rejecting that argument, the Court observed, "While in *Massiah* it may have been the Government agent who was responsible for setting up the meeting with the defendant, one discovers this only by looking at the opinions of the Court of Appeals. It is not mentioned in this Court's opinion since the issue of who set up the meeting with whom was not pertinent to our disposition." *Moulton*, 474 U.S. at 174.

whether a prosecutor is involved in the proceeding. *O'Kelley* v. *State*, 604 S.E.2d 509, 511-512 (Ga. 2004).

B. *Kirby* v. *Illinois* Does Not Support The Fifth Circuit's Analysis

The Fifth Circuit apparently derived its "prosecutorial involvement" test in part from its reading of *Kirby*'s statement that "[t]he initiation of judicial criminal proceedings" is significant because it is at that time that "the government has committed itself to prosecute," "the adverse positions of government and defendant have solidified," and "a defendant finds himself faced with the prosecutorial forces of organized society." 406 U.S. at 689; *see* Pet. App. 5a. But—particularly in light of this Court's subsequent holdings in *Brewer* and *Jackson*—it is clear that the Fifth Circuit misconstrued the import of this language, which in fact provides no support for the Fifth Circuit's approach.

Kirby's holding—as this Court has repeatedly recognized since—was that the right to counsel attaches upon "[t]he initiation of judicial criminal proceedings." 406 U.S. at 689. And *Kirby* expressly recognized that judicial criminal proceedings may commence by "arraignment," which *Brewer* and *Jackson* later made clear includes initial post-arrest "arraignment[s]" before a magistrate. *See id.*; *Jackson*, 475 U.S. at 629 n.3. In many jurisdictions, "police often file charges on their own initiative," and defendants are arraigned on those charges, including in some felony cases, without any involvement by a prosecutor. LaFave, § 1.3(h), at 98-

99.[14] Neither *Kirby* nor any subsequent decision of this Court suggests that a constitutional distinction should be drawn between court arraignments based on the happenstance of whether police or prosecutors initiated the process leading to the arraignment. *Cf. Moran* v. *Burbine*, 475 U.S. 412, 430 (1986) ("As a practical matter, it makes little sense to say that the Sixth Amendment right to counsel attaches at different times depending on . . . fortuity[.]").

Indeed, the function of an initial arraignment like the one in *Brewer*, in *Jackson*, and in this case is the same—and its consequences for the defendant are identical—whether or not a prosecutor is involved. In either case, an arraignment is the inception of the State's criminal process, transforming the person arraigned from a suspect under investigation to a defendant against whom the State has made an accusation of criminal conduct. In either case, if the crime charged is a felony, the arraignment almost invariably results in significant restrictions on the defendant's liberty, either through confinement in jail, or release subject to bail or other conditions, with the prospect of jail if those conditions are not satisfied. And in either case, an arraignment marks the point at which the defendant becomes "immersed in the intricacies of substantive and procedural law," *Kirby*, 406 U.S. at 689, and consequently requires "the guiding hand of counsel," *Powell*, 287 U.S. at 69. As this Court has observed, that guid-

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[14] *See also* William F. McDonald et al., *Police-Prosecutor Relations in the United States* 205-206 (U.S. Dep't of Justice, Nat'l Inst. of Justice 1981) (finding that police filed initial charges directly with the courts in all or some cases in 64% of jurisdictions surveyed).

ing hand is necessary not only to enable the accused to "meet the adversary presentation of the prosecutor," but also to play the "different . . . role" of assisting him in navigating the "legal system governed by complex rules and procedures," *Evitts* v. *Lucey*, 469 U.S. 387, 394 n.6 (1985), that he faces upon arraignment. In short, whether or not a prosecutor is involved, an initial appearance at which a court informs an arrestee of the accusation against him, and restricts his liberty to ensure that he answers that accusation, marks the point at which he becomes an "accused," with all the attendant burdens of that status—and a consequent need for the assistance of counsel.

Rather than focusing on the function and effect of a defendant's initial appearance, the Fifth Circuit read *Kirby* to mean that a defendant's confrontation by a judicial officer with the accusation against him and commitment to confinement could not initiate adversary judicial proceedings unless there was some other indication that a particular official had "committed [the State] to prosecute." *Kirby*, 406 U.S. at 689. This turns the reasoning of *Kirby* on its head. As *Kirby* made clear, it is "[t]he initiation of judicial criminal proceedings" itself—however such proceedings are commenced—that signals the government's commitment to prosecute. *Id.* No further evidence of the government's adverse position is needed.

Nor has this Court ever suggested that the "prosecutorial forces of organized society," *Kirby*, 406 U.S. at 689, are limited to prosecuting attorneys. Rather, as this Court has recognized, "the Sixth Amendment concerns the confrontation between the *State* and the individual," and requires that "[t]he Court impute the State's knowledge from one state actor to another." *Jackson*, 475 U.S. at 634 (emphasis added). And the

function of counsel is to serve as "a 'medium' between [the defendant] and the *State*." *Moulton*, 474 U.S. at 176 (emphasis added). The Sixth Amendment right to counsel thus applies when "the accused [is] confronted . . . by the procedural system, *or* by his expert adversary, *or by both*." *United States* v. *Gouveia*, 467 U.S. 180, 189 (1984) (internal quotation marks and citation omitted) (emphases added).

When, as here, a defendant is confronted by the sovereign authority of the State in the person of a judge, informed of a criminal accusation that has been leveled against him "in the name and by the authority of the State," Pet. App. 33a, and committed to confinement based on that accusation, he is confronted with "the prosecutorial forces of organized society." After such a proceeding, there can be no doubt that—in *Kirby*'s phrase—"the adverse positions of government and defendant have solidified," 406 U.S. at 689, judicial criminal proceedings have commenced, and the defendant's Sixth Amendment right to counsel has attached.

III. The Fifth Circuit's Test Is Unworkable And Threatens To Impose Serious Hardship On Indigent Defendants

A. The Fifth Circuit's Test Requires An Unworkable And Unduly Intrusive Inquiry Into Prosecutors' Deliberations And Communications

This Court's decisions in *Kirby*, *Brewer*, and *Jackson* establish a straightforward, objective test for determining when the Sixth Amendment right to counsel attaches: the act of haling a criminal defendant before a judicial officer, who apprises the accused of the government's allegations and commits him to bail or jail, marks the commencement of adversary judicial proceedings and triggers the right to counsel. That consti-

tutional rule has the obvious virtues of simplicity and ease of application, turning as it does on the occurrence of clear and objectively verifiable events that are matters of public record. *See O'Kelley*, 604 S.E.2d at 511 (noting that this Court's precedent on the attachment of the right to counsel eschews "case-by-case analysis" in favor of a "simplified analysis based on categories of proceedings").

By contrast, under the Fifth Circuit's rule, an indigent defendant's request for the appointment of counsel following an initial appearance requires the resolution of a case-specific factual inquiry: was the defendant arrested and brought before a judge for an initial appearance (as is often the case) based solely on the allegations of a police officer without the awareness or involvement of a prosecuting attorney, or did a prosecutor play some role prior to the initial appearance? Having the attachment of the right to counsel turn on the answer to what the Fifth Circuit itself described as a "sometimes elusive" inquiry, Pet. App. 6a, would have a number of undesirable consequences.

First, such a rule would prolong and complicate routine criminal proceedings. Requiring an evidentiary inquiry into the communications between the police and the prosecutor's office to determine whether a prosecutor was aware of, or involved in, the process leading to a defendant's arrest and initial appearance would add unnecessary expense and delay and further tax limited judicial resources. Moreover, it is unclear what degree of awareness or involvement by prosecutors is required under the Fifth Circuit's rule. That rule may thus lead to litigation over questions such as whether it is sufficient that a police officer informed a prosecutor that an individual had been arrested or whether a prosecutor must be involved in the pretrial proceedings in some

manner, and if so, the requisite extent and formality of such involvement. *Cf. Berkemer* v. *McCarty*, 468 U.S. 420, 432 (1984) (rejecting doctrinal proposal where "[t]he litigation necessary to resolve such matters would be time-consuming and disruptive of law enforcement").

Second, under the Fifth Circuit's rule, the defendant's right to counsel may turn in many cases on the resolution of a contested evidentiary proceeding—in circumstances in which the key evidence is necessarily in the State's hands. Requiring the defendant to conduct that proceeding, without counsel, in order to determine whether he is entitled to counsel would put him in a self-evidently unfair position.

Third, a rule under which the right to counsel is triggered by a prosecutor's involvement would create a perverse incentive for prosecutors to delay their involvement in criminal proceedings. Early prosecutorial involvement, however, is important to rectifying meritless arrest and pretrial detention decisions. *See, e.g.*, LaFave, § 1.3(h), at 99-103 (noting that prosecutorial screening of cases prior to the filing of charges and initial appearance frequently results in a decision not to proceed further).

Fourth, the Fifth Circuit's rule would require an inquiry into the kind of inner workings of the law enforcement establishment—including communications between police officers and prosecutors, and among attorneys within the prosecutor's office—that may be the subject of statutory and common-law privileges, including the attorney-client and attorney work product privileges, the law enforcement privilege, and the deliberative process privilege. *See generally Puerto Rico* v. *United States*, 490 F.3d 50, 62-64 (1st Cir. 2007) (dis-

cussing law enforcement privilege); *In re U.S. Dep't of Homeland Sec.*, 459 F.3d 565, 568-569 (5th Cir. 2006) (same); *United States* v. *Edelin*, 128 F. Supp. 2d 23, 39-40 (D.D.C. 2001) (discussing deliberative process, attorney-client, and work product privileges).

Finally, requiring such a fact-specific inquiry runs contrary to the common-sense interest in providing clear and simple rules in matters of criminal procedure. As one leading Sixth Amendment scholar has noted, a rule requiring a court to "ascertain the precise point when the state makes an actual, substantive decision to pursue conviction" in order to determine when the right to counsel attaches "would be impractical" because it would require an inquiry into "subjective mental processes" in which, often, the "only evidence would be the potentially self-serving reports of state agents." James J. Tomkovicz, *An Adversary System Defense of the Right to Counsel Against Informants: Truth, Fair Play, and the* Massiah *Doctrine*, 22 U.C. Davis L. Rev. 1, 68 n.272 (1988). And, as this Court has observed, clear rules are particularly important in criminal procedure "so that States and counties may establish procedures with confidence that they fall within constitutional bounds." *Riverside*, 500 U.S. at 56; *see, e.g.*, *Minnick* v. *Mississippi*, 498 U.S. 146, 151 (1990) (noting the "merit" of rules of criminal procedure with "clarity of . . . command" and "certainty of . . . application").[15]

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[15] *See also* Donald A. Dripps, *Constitutional Theory for Criminal Procedure:* Dickerson, Miranda, *and the Continuing Quest for Broad-But-Shallow*, 43 Wm. & Mary L. Rev. 1, 40 (2001) (noting that "the case for general rules governing criminal procedure is overwhelming" in light of the "volume of cases presenting constitutional issues . . . and the need to supply . . . lower courts with reliable guidance").

B. The Fifth Circuit's Rule Threatens To Cause Serious Harm To Indigent Defendants

In addition to being unworkable in practice, the rule adopted by the Fifth Circuit—under which the right to counsel would not attach until indictment, absent a showing of prosecutorial involvement in pre-indictment proceedings—does violence to core Sixth Amendment values. Under that rule, an indigent defendant who is innocent of the charges against him could nevertheless sit in jail for months awaiting indictment "because he does not know how to establish his innocence." *Powell*, 287 U.S. at 69.

That concern is far from theoretical. According to a report to the Texas State Bar, prior to 2001, in some Texas counties it was "quite common that the appointment of counsel [did] not occur until after an indictment from the grand jury. In these instances, defendants languish[ed] in jail for considerable periods of time without the benefit of legal representation."[16] The report described one such case:

> The Committee has been told the story of a woman who sat in jail for 27 days before an attorney was assigned to her matter. Within 45 minutes after receiving the case, her court ap-

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[16] Allan K. Butcher & Michael K. Moore, *Muting Gideon's Trumpet: The Crisis in Indigent Criminal Defense In Texas* (Sept. 22, 2000), *available at* www.uta.edu/pols/moore/indigent/last.pdf. This report was prepared by the Committee on Legal Services to the Poor in Criminal Matters of the State Bar of Texas, which was charged by the Texas State Bar with "study[ing] the system of defense of indigent persons in criminal law matters in Texas, collect[ing] data and other information . . . and develop[ing] recommendations for action by the State Bar of Texas [and] the Texas Legislature." *Id.*

> pointed attorney determined the case lacked merit [and] he approached the prosecutor who agreed, and the judge ordered her release. The effect of this is quite clear—the timely appointment of counsel would have resulted in this woman's near immediate release instead of costing her nearly one month in jail.[17]

In cases in which an indigent defendant cannot prove that a prosecutor was aware of or involved in his arrest or initial appearance, the Fifth Circuit's rule would permit precisely this result.

As such cases demonstrate, the denial of counsel exacts a particularly high toll on indigent defendants who, like Rothgery, would be able promptly to secure the dismissal of charges with the assistance of counsel. Absent such assistance, "a law-abiding citizen wrongfully arrested" may be left in jail, "compelled to await the grace of a Dickensian bureaucratic machine," *Riverside*, 500 U.S. at 70-71 (Scalia, J., dissenting), until prosecutors determine whether to indict him. Such "[p]retrial confinement may imperil [a defendant's] job, interrupt his source of income, and impair his family relationships." *Gerstein*, 420 U.S. at 114. Moreover, even an accused who is able to post bail and be released from jail faces serious harms:

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[17] *Id.* In 2001, Texas enacted the Fair Defense Act, which required counties to adopt procedures allowing for prompt access to counsel by incarcerated persons. *See* Texas Fair Defense Act, 77th Leg., R.S., ch. 906, 2001 Tex. Gen. Laws 906; Tex. Code Crim. Proc. art. 1.051. For persons released on bail, the Fair Defense Act makes entitlement to the appointment of counsel turn on whether adversary judicial proceedings have commenced. *See* Tex. Code Crim. Proc. art. 1.051(j).

> A person facing serious criminal charges is hardly freed from the state's control upon his release from a police officer's physical grip. He is required to appear in court at the state's command. . . . Pending prosecution, his employment prospects may be diminished severely, he may suffer reputational harm, and he will experience the financial and emotional strain of preparing a defense.

Albright v. *Oliver*, 510 U.S. 266, 278 (1994) (Ginsburg, J., concurring).

Under the Fifth Circuit's approach, then, an indigent defendant could suffer extended restrictions on his liberty, and all the harms attendant on an unresolved criminal accusation, solely because he is unable to afford counsel to prove his innocence. Because the vast majority of felony defendants are in need of court-appointed counsel,[18] the Fifth Circuit's rule would thus severely and inequitably constrict access to justice.

This Court, of course, recognized this fundamental point nearly 45 years ago, observing that the "noble ideal" in which "every individual stands equal before the law" "cannot be realized if the poor man charged with crime" lacks "a lawyer to assist him." *Gideon*, 372 U.S. at 344. The decision below cannot be squared with this basic principle.

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[18] In 1996, 82 percent of felony defendants prosecuted in state courts in the 75 largest counties had state-appointed counsel. U.S. Dep't of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Defense Counsel in Criminal Cases* 1 (Nov. 2000), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/dccc.pdf.

CONCLUSION

For the foregoing reasons, the judgment of the Fifth Circuit should be reversed.

Respectfully submitted.

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JANUARY 2008

85 666 64pgs 10

No. 07-440

IN THE

Supreme Court of the United States

WALTER ALLEN ROTHGERY,
Petitioner,

v.

GILLESPIE COUNTY, TEXAS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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STATEMENT OF THE CASE

No court has ever recognized the theory Rothgery asserts, that there is a Sixth Amendment right to continuous representation by counsel, unconnected with any identifiable event constituting a critical stage, from just after the time of arrest. Rothgery's vision of the Sixth Amendment right to counsel is contrary to the Court's long-settled precedent in two key respects: (1) it seeks to quietly overturn *Gerstein* v. *Pugh*, 420 U.S. 103 (1975), by defining a probable-cause determination on a warrantless arrest as the formal initiation of adversary judicial proceedings; and (2) contrary to *Kirby* v. *Illinois*, 406 U.S. 682 (1972), and its progeny, it seeks to decouple appointment from the need for assistance of counsel at a critical stage of proceedings.

The Court has articulated a consistent general rule that the formal initiation of adversary judicial proceedings is the point at which the Sixth Amendment right to the assistance of counsel is triggered. There were only two possible events that Rothgery could claim as a critical proceeding that might entitle him to appointed counsel. Regarding the first, the initial appearance after his arrest, *Gerstein* makes clear that counsel was not required and, in any event, he expressly declined the assistance of counsel. At the second, the appearance after his indictment, he requested and was appointed counsel. There was no event or proceeding anytime between his first and second appearance for which the Constitution required appointment of counsel to Rothgery.

None of the factors that have led the Court to recognize certain limited exceptions to the formal-charges rule for specific, critical stages of prosecution apply because Rothgery's appearance was nonadver-

sarial, nonevidentiary, nonprosecutorial, and held no potential to unfairly prejudice Rothgery's eventual defense to any charge that might ultimately be filed against him. Moreover, without some hearing or event at which the assistance of counsel was constitutionally required (or needed), it is impossible to define an event of attachment that would make the failure to appoint counsel a violation of Rothgery's Sixth Amendment rights.

In advancing his claim, Rothgery is attempting to unmoor the Sixth Amendment from its historical and doctrinal underpinnings, by asking the Court to determine the question of attachment while leaving the underlying question of a constitutional violation completely unaddressed. Indeed, he expressly asks the Court to decide the issue of attachment independent of whether there was a critical proceeding that would require the actual attendance or assistance of counsel. In so doing, Rothgery stands the Court's traditional right-to-counsel jurisprudence on its head by seeking to sever the question of attachment from the inherently connected analysis of whether the Court can identify some critical proceeding at which the assistance of counsel is necessary to protect the defendant's right to a fair trial.

Knowing that he waived his right under Texas law to have counsel present at the article 15.17 appearance, Rothgery never asserted in his complaint that the county (or, more accurately, the state district court) was required to ensure that he had the assistance of counsel when he was magistrated. Instead, Rothgery asserted that counsel should have been appointed for him at some unspecified time after he had been released on bail, without reference

to another critical proceeding at which counsel's presence and assistance was required. Beyond the fact that *United States* v. *Gouveia*, 467 U.S. 180, 189 (1984), makes very clear that a person is not entitled to appointment of counsel to act as a private investigator to begin to develop a defense when no formal charges are pending, there was no defense to prepare. No decision had been made by any prosecutor to bring any charges against Rothgery, much less felony charges. It was entirely possible that the prosecutor could have decided to bring only misdemeanor charges for openly carrying a handgun or no charges at all. Under the circumstances, any attorney appointed in the interim could at most have served as an investigator and precharge negotiator, but the Court has rejected those roles as being covered by the Sixth Amendment right to the assistance of counsel.

When the Court has previously said that the right to the assistance of counsel attaches at or after the initiation of adversary judicial proceedings, it has meant that the right attaches to some proceeding or event at which the assistance of counsel is necessary (like an interrogation or a postindictment lineup), not merely that an obligation to appoint counsel arises out of the ether. By trying to push the event of attachment back to a presentation of warnings that follows every arrest in Texas and to sever the natural bonds between attachment and critical proceedings, Rothgery is attempting to dangerously steer the Court into nonsensically defining the Sixth Amendment trigger in an empty, formalistic way that has no roots in the Court's consistent pronouncements on the appointment of counsel. Such a formalistic rule would not serve the interests of the Sixth Amendment. It would instead further

burden state and local appointment systems without any textual basis in the Sixth Amendment for doing so, without any measurable benefit to the fair-trial interests that underlie the Sixth Amendment right to counsel, and without any material identifiable constitutional problem in the appointment processes that exist throughout the United States.

STATEMENT OF FACTS

On July 14, 2002, Walter Rothgery was fired as manager of the Oakwood RV Park, in Fredericksburg, Texas, and became upset and verbally abusive towards the park's owner. SJ Opp. Ex. 1. The next day, police received a report that Rothgery was walking around the RV park with a pistol, handcuffs, mace, extra bullets, and a knife. *Ibid.* When officers arrived, they found Rothgery in possession of a handgun as well as a long knife. *Ibid.* An instant background check indicated that he was a felon who had been convicted of possession of a controlled substance in California. *Ibid.* Officers then arrested Rothgery on suspicion of being a felon in unlawful possession of a firearm, a third-degree felony. Tex. Penal Code §46.04.

After his arrest, Rothgery was taken to jail, where he was booked, photographed, and then presented to a magistrate.[1] SJ Opp. Ex. 3 at 62, 64-65. According to Rothgery, his initial encounter with the magistrate

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[1] Under Texas law, magistrates include various officials appointed in particular counties by judges in that county. Tex. Code Crim. Proc. art. 2.09. Magistrates are charged with preserving the peace through lawful means, issuing process to prevent and suppress crime, and causing the arrest of offenders. *Id.* art. 2.10. The magistrate Rothgery spoke to was a Gillespie County justice of the peace. SJ Opp. Exs. 3, 4.

occurred at the same time he was being processed from his arrest. *Id.*, at 64 ("[W]hen they were taking my pictures and everything, I turned around to a little glass window and talked to a magistrate."). He appeared before the magistrate again the next morning. Rothgery described his appearance before the magistrate as standing "at a little glass window filling out forms." *Id.*, at 62. At his appearance, Rothgery went through the forms, and the magistrate gave him certain warnings. This appearance before the magistrate, which is sometimes referred to in Texas practice as "a magistration" or "being magistrated," is required under articles 14.06 and 15.17 of the Texas Code of Criminal Procedure, to give every arrestee required information and warnings about his rights. Tex. Code Crim. Proc. arts. 14.06, 15.17.

Through the "little glass window," Rothgery was given a form called a "Warning By Magistrate (Setting Bail & Right to Attorney)." SJ Ex. B. The form informed Rothgery that he had been accused of unlawful possession of a firearm by a felon, but that charges had not yet been filed against him. *Ibid.* (form stating that charges "will be" filed in district court). It informed him of his right to have an attorney present "[i]f peace officers or attorneys representing the state question you," and that "[i]f you cannot afford to hire a lawyer, you have the right to have one appointed." *Ibid.* It next informed him of his right to remain silent, and that any statement he made could be used against him. *Ibid.* It informed him that "[i]n felony cases, you have the right to an examining trial," which is a Texas preindictment procedure in felony cases for assessing the sufficiency of evidence to prosecute. *Ibid.*; see Tex. Code Crim.

Proc. art. 16.01. The form indicated that Rothgery's bond was set at $5,000. SJ Ex. B.

The form also included several certifications by the magistrate. The magistrate certified that, in accordance with state statutory and Fourth Amendment requirements, Rothgery had been brought before him not later than 48 hours after arrest, that the magistrate had informed Rothgery of his rights to an attorney and appointment of an attorney, and that there was a paper record of the magistrate's advising Rothgery of his right to an appointed attorney. *Ibid.* Finally, the magistrate certified, and Rothgery confirmed by initialing, that Rothgery had decided to waive counsel at that time. *Ibid.* Rothgery had, and waived, a Texas statutory right to consult with counsel before his bail was set. See Tex. Code Crim. Proc. art 15.17(a). If Rothgery had requested counsel at that time, Gillespie County procedures provided that counsel would have been appointed for him. SJ Ex. B; SJ Ex. H at 1. The magistrate and the booking officer signed the form at the bottom. SJ Ex. B. Rothgery also signed the bottom of the form, under the title "PERSON WARNED." *Ibid.*

At the same time, the magistrate also reviewed and signed an "Affidavit of Probable Cause" prepared by the arresting officer. SJ Ex. A. The affidavit set forth that witnesses from the trailer park had reported that Rothgery had been carrying a weapons belt, the fact that officers found him carrying a firearm, and that a background check had revealed that he had been convicted in California of felony possession of a controlled substance. *Ibid.* The magistrate's signature certified that, based on the affidavit, probable cause existed for Rothgery's

arrest. *Ibid.* The filing of the probable-cause affidavit to justify a warrantless arrest was insufficient to constitute the filing of formal criminal charges against Rothgery. Felonies may only be formally charged in Texas courts by indictment or, upon waiver of indictment by a defendant, by information. *Teal* v. *State*, 230 S.W.3d 172, 174 (Tex. Crim. App. 2007); *State* v. *Boseman*, 830 S.W.2d 588, 590, n.3 (Tex. Crim. App. 1992).

No one from the Gillespie County prosecutor's office was aware of, much less present at, Rothgery's appearance before the magistrate. Pet. App. at 6. Prosecutors were not aware of the filing or contents of the affidavit of probable cause, and the affidavit did not reflect a decision or commitment by prosecutors to prosecute Rothgery. *Ibid.* Rothgery was not questioned during the appearance, other than to acknowledge that he had received the required warnings. SJ Opp. Ex. 3 at 64. No witnesses were presented or examined, nor was any evidence considered. *Ibid.* After Rothgery was processed, magistrated, bonded, and released, there was no case or charge against him.

Approximately six months passed, during which Rothgery was neither imprisoned nor under indictment. SJ Opp. Ex. 3 at 86. During that period, no investigators or prosecutors contacted Rothgery or communicated with him about his arrest. Rothgery claims to have requested appointment of counsel several times in the period after the initial article 15.17 appearance, but before his indictment, including immediately after the appearance itself.[2]

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[2] There is no evidence of most of these claimed requests other than Rothgery's own testimony, but in the summary-judgment posture of this case, those claims must be taken as true.

SJ Opp. Ex. 3 at 71-72, 86-87. Texas law, in any event, provides that an indigent arrestee out on bail need not be provided with counsel "until the defendant's first court appearance or when adversarial judicial proceedings are initiated, whichever comes first." Tex. Code Crim. Proc. art. 1.051(j).

The Gillespie County prosecutor's office, after eventually reviewing Rothgery's file, decided to indict and prosecute him. On the afternoon of January 17, 2003, a grand jury indicted Rothgery for being a felon in possession of a firearm. SJ Opp. Ex. 9. A capias then issued for Rothgery, which, unlike the prior affidavit of probable cause, clearly indicated that Rothgery had been indicted for unlawful possession by a felon. SJ Ex. C. Rothgery was rearrested on January 18, 2003. On January 19, he was again magistrated based on the second arrest. The warning form from the second magistration, unlike that from the first, indicated that he had been accused of a criminal offense that had been filed in the district court. SJ Ex. E. The form also, unlike the first one, indicated that Rothgery had requested the appointment of counsel. *Ibid.*[3]

On January 23, Gillespie County received a request for counsel from Rothgery and faxed it to the district judge, who promptly appointed counsel for him. SJ Ex. F. The three business days that passed before the judge appointed counsel for Rothgery complied with Texas law and with Gillespie County's plan for appointing counsel. (January 18th and 19th were

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[3] The form itself was identical; the differences were indicated by strikethroughs and the checking of different boxes on the form.

weekend days, and January 20th was a holiday.) See Tex. Code Crim. Proc. art. 1.051(i).

After being appointed, Rothgery's lawyer began working on the file on January 31, and first consulted with Rothgery on February 9. SJ Opp. Ex. 13. The lawyer ultimately secured paperwork indicating that Rothgery had been allowed to withdraw his guilty pleas in his California case after completing a diversionary program. SJ Opp. Ex. 14; Pet. App. at 2. The indictment against Rothgery was ultimately dismissed.

Rothgery sued Gillespie County under 42 U.S.C. §1983, seeking damages for the county's not appointing him counsel during the months between his initial magistration and his indictment. Compl. at 8-10. He claimed that the County had a policy of not appointing counsel for arrestees released from jail on bond and that this policy violated his Sixth and Fourteenth Amendment rights. Pet. App. at 4.

Gillespie County moved for summary judgment on numerous grounds. Mot. for SJ at 3-10. The district court dismissed the case on the ground that Rothgery's right to counsel did not attach until he was indicted by the State and the Fifth Circuit affirmed. Pet. App. at 4, 12.

The Fifth Circuit, applying this Court's precedents along with its own, focused on whether the article 15.17 magistration marked the commencement of adversarial judicial proceedings against Rothgery and concluded it had not. Pet. App. at 12. In particular, the court concluded that the State had not committed to prosecute Rothgery. *Id.*, at 6 (citing Tex. Code Crim. Proc. art. 2.13). Rothgery then

petitioned for certiorari, and the Court granted review.

SUMMARY OF ARGUMENT

The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const., Amdt. 6. Because the right is textually limited to actual criminal prosecutions, the right to counsel attaches "only at or after the time that adversary judicial proceedings have been initiated against" an arrestee. *Kirby*, 406 U.S., at 688. Rothgery's magistration did not initiate adversary judicial proceedings against him.

The Fifth Circuit, consistent with this Court's jurisprudence on the Sixth Amendment right to the assistance of counsel, held that adversarial judicial proceedings begin when the government commits to prosecution. Because the core purpose of the Sixth Amendment guarantee of the accused's right to assistance of counsel is to preserve his right to a fair trial by "protecting the unaided layman at critical confrontations with his adversary," *Gouveia*, 467 U.S., at 189, the determinative fact must be whether the State has become the adversary of the accused. The Court has consistently followed the general rule that adversary judicial proceedings begin with the filing or presentation of formal charges, and in deciding whether to recognize exceptions has consistently applied an analysis that considers whether the State has actually become the adversary of the accused. That condition was simply not met by Rothgery's initial article 15.17 appearance, which was a fundamentally nonadversarial proceeding.

Rothgery's appearance before the magistrate included the probable-cause determination required by *Gerstein* v. *Pugh*, 420 U.S. 103 (1975), statutory warnings required by article 15.17, and the setting of bail. Nothing during that appearance initiated adversary judicial proceedings, nor was any of it a critical stage of criminal proceedings. Combining them into one hearing cannot change that conclusion. The appearance was nonadversarial, administrative, occurred before the filing of any formal charges, provided no opportunity for examination of witnesses or other interaction between Rothgery and the State, and had no possible effect on Rothgery's right to a fair trial on any charges that might ultimately be brought against him. When it concluded, Rothgery was free on bail. There was no case, no charge, and no decision had been taken to prosecute—indeed the prosecutor was not even aware of the arrest or its circumstances.

Moreover, six months of inaction followed. Nothing in this Court's cases suggests or holds, as Rothgery contends, that an accused has a constitutional right to appointment of counsel as soon as adverse proceedings begin even when no critical event such as an interrogation intervenes. Thus, even if Rothgery's article 15.17 magistration had initiated adversary judicial proceedings, counsel was appointed for him well in advance of any critical stage of the prosecution, so there was in any event no violation of his right to counsel.

Rothgery's proposed standard is contrary to the Court's cases, unworkable, and unwise. The Sixth Amendment does not require the appointment of counsel to give a defendant a running head start on the prosecution before prosecution is even begun.

Instead the Court has firmly rejected that proposition, making clear that "our cases have never suggested that the purpose of the right to counsel is to provide a defendant with a preindictment private investigator." *Gouveia,* 467 U.S., at 191. But that is exactly what Rothgery proposes—that his rights were violated by not having a lawyer appointed to conduct an investigation to prevent him from being indicted (because it is uncontested that, once he was indicted, he was timely provided with a lawyer, and the charges were ultimately dismissed).

Accepting Rothgery's position would call into question numerous precedents of this Court by functionally extending the Sixth Amendment right to counsel virtually to the point of arrest. It would, further, do so for no good reason, given that the interests Rothgery is seeking to vindicate are already protected by other rights such as the Fourth Amendment right against unlawful seizures, the Fifth Amendment right against self-incrimination, the Sixth Amendment right to a speedy trial, statutes of limitations, speedy-trial statutes, and statutes (like Texas's) that ensure assistance of counsel for persons held in custody. Moreover, accepting Rothgery's contention would cause widespread practical harm to law enforcement and local authorities, and visit substantial new costs on counties in Texas and elsewhere if forced to appoint and pay for counsel prior to indictment even when no critical proceedings are taking place. It would extend the Sixth Amendment right to counsel to the routine, administrative events accompanying the processing of a suspect immediately after arrest, and even possibly back to the point of arrest itself.

ARGUMENT

I. THE SIXTH AMENDMENT RIGHT TO ASSISTANCE OF COUNSEL PROTECTS AN ACCUSED'S RIGHT TO A FAIR TRIAL.

The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const., Amdt. 6. The "core purpose" of the right to counsel has long been recognized as "assur[ing] 'Assistance' at trial, when the accused was confronted with both the intricacies of the law and the advocacy of the public prosecutor." *United States* v. *Ash*, 413 U.S. 300, 309 (1973). Thus, the right to counsel "has been accorded . . . not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial." *Mickens* v. *Taylor*, 535 U.S. 162, 165 (2002) (quotation omitted). The amendment's text reflects the Framers' historical motivations for rejecting the English common-law rule denying counsel to accused felons, particularly a solicitude for unaided laymen confronted by an intricate procedural system and "a desire to minimize imbalance in the adversary system that otherwise resulted with the creation of a professional prosecuting official." *Ash*, 413 U.S., at 307-309.

The Court's modern Sixth Amendment jurisprudence has consistently focused on preserving the right to a fair trial by ensuring that an accused has the assistance of counsel during critical stages of postindictment, pretrial proceedings. In *Powell* v. *Alabama*, 287 U.S. 45, 53 (1932), the Court laid out this concern:

> "during perhaps the most critical period of the proceedings against the[] defendants, that is to

> say, from the time of their arraignment until the beginning of their trial, when consultation, thorough-going investigation and preparation were vitally important, the defendants did not have the aid of counsel in any real sense, although they were as much entitled to such aid during that period as at the trial itself." *Id.*, at 57.

Following *Powell*, the Court recognized that the right to counsel encompassed pretrial events and proceedings at which the absence of counsel might derogate from a subsequent fair trial. These proceedings included arraignments at which defenses must either be raised or waived, *Hamilton* v. *Alabama*, 368 U.S. 52, 53-54 (1961), entry of a plea, *White* v. *Maryland*, 373 U.S. 59, 59 (1963) (*per curiam*), and postindictment lineups, *United States* v. *Wade*, 388 U.S. 218, 236-237 (1967). All of these cases, and others decided by the Court, recognized the right to counsel for proceedings that took place after the filing of formal charges—that is, the initiation of the "criminal prosecution" described by the Sixth Amendment. And each of them was firmly rooted in the commitment to protecting the right to a fair trial. See, *e.g.*, *id.*, at 224. The Court for the first time in *Coleman* v. *Alabama* recognized a right to counsel for a proceeding that preceded the filing of formal charges: adversarial preliminary hearings at which defendants were afforded an opportunity to cross-examine the witnesses against them, 399 U.S. 1, 9-10 (1970) (plurality opinion).

Throughout these cases, the touchstone remained the right to a fair trial. Thus, the Court clearly stated the proper test to determine whether the right to counsel should be extended to cover a particular

pretrial proceeding: A federal court must, first, "scrutinize any pretrial confrontation of the accused to determine whether the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial as affected by his right meaningfully to cross-examine the witnesses against him and to have effective assistance of counsel at the trial itself," and, second, "analyze whether potential substantial prejudice to defendant's rights inheres in the particular confrontation and the ability of counsel to help avoid that prejudice." *Wade*, 388 U.S., at 227. When the absence of counsel from a particular confrontation would prejudice the fair-trial right, the Sixth Amendment right attaches "to assure that the accused's interests will be protected consistently with our adversary theory of criminal prosecution." *Ibid.*

The Court also, in parallel with these cases, beginning with *Massiah* v. *United States*, 377 U.S. 201 (1964), and *Escobedo* v. *Illinois*, 378 U.S. 478 (1964), developed a right-to-counsel jurisprudence focused on protecting the accused's rights not to prejudice his defense through communications with police and prosecutors. The "prime purpose" of right-to-counsel cases in this context was "not to vindicate the constitutional right to counsel as such, but, like *Miranda* [v. *Arizona*, 384 U.S. 436 (1966)], to guarantee full effectuation of the privilege against self-incrimination." *Kirby*, 406 U.S., at 689 (quoting *Johnson* v. *New Jersey*, 384 U.S. 719, 729 (1966)). Thus, the Court developed a test to evaluate whether police communications with an accused violate the accused's Sixth Amendment rights, which looks to whether police have deliberately elicited incriminating statements from an accused. See, *e.g.*, *Fellers* v. *United States*, 540 U.S. 519, 523-524 (2004) (collecting cases). That test is related to, but

"expressly distinguished" from, "the Fifth Amendment custodial-interrogation standard." *Ibid.* (citing *Michigan* v. *Jackson*, 475 U.S. 625, 632, n.5 (1986)).

In subsequent cases, the Court has applied these fundamental principles to answer new questions about whether the Sixth Amendment right to counsel extended to other sorts of proceedings, but always has hewed to the bedrock principle of protecting the ultimate right to a fair trial by providing assistance after the initiation of criminal prosecution for those proceedings that could affect the ultimate fairness of the trial. Thus, the Court rejected the extension of the right to preindictment lineups in *Kirby*, 406 U.S., at 689-690. In doing so, the Court declared that "the initiation of adversary judicial criminal proceedings" marked "the commencement of the 'criminal prosecutions' to which alone the explicit guarantees of the Sixth Amendment are applicable." *Id.*, at 689-690. The Court also rejected the extension of the Sixth Amendment guarantee to a prosecutor's interview with an identification witness using a photographic display that included a picture of the defendant. *Ash*, 413 U.S., at 321. The Court rejected the expansion because there was no possibility the accused would be misled on the law or otherwise "overpowered by his professional adversary," and providing counsel under such circumstances would not "produce equality in a trial-like adversary confrontation." *Id.*, at 317.

Similarly, the Court rejected the extension of the guarantee to counsel to the probable-cause determination following a warrantless arrest. *Gerstein*, 420 U.S., at 122-123. And, finally, in *Gouveia*, the Court rejected the argument that preindictment detention alone triggers the

appointment of counsel, reaffirming that it has "never held that the right to counsel attaches at the time of arrest" or "suggested that the purpose of the right to counsel is to provide a defendant with a preindictment private investigator." *Gouveia*, 467 U.S., at 190, 191.

There have been few significant attempts since *Gouveia* to expand the formal pretrial proceedings to which the right to counsel applies, and few cases in this Court since then addressing the scope of the right. This quiescence indicates the broad acceptance, and demonstrated practical workability, of the settled doctrine that Rothgery seeks to alter: Sixth Amendment rights attach "at the initiation of adversary judicial criminal proceedings" and require appointing counsel at "certain 'critical' pretrial proceedings" that follow or coincide with initiation. *Id.*, at 189. The right to counsel entitles an accused to the "guiding hand of counsel," *Hamilton*, 368 U.S., at 54, at all points during a prosecution when "counsel's absence might derogate from the accused's right to a fair trial," *Wade*, 388 U.S., at 226. Importantly, the right to counsel "[i]s not implicated, as a general matter, in the absence of some effect of the challenged conduct on the trial process itself." *Michigan* v. *Harvey*, 494 U.S. 344, 363 (1990) (Stevens, J., dissenting); see also *Ash*, 413 U.S., at 311 ("The Court consistently . . . has expanded the constitutional right to counsel only when new contexts appear presenting the same dangers that gave birth initially to the right itself."). And "the right to the assistance of counsel is shaped by the need for the assistance of counsel," *Maine* v. *Moulton*, 474 U.S. 159, 170 (1985), and so requires a "pragmatic assessment of the usefulness of counsel to the accused at the particular proceeding and the

dangers to the accused of proceeding without counsel." *Patterson* v. *Illinois*, 487 U.S. 285, 298 (1988).

Certain events to which the guarantee of counsel applies require preparation, so it may be necessary to appoint counsel before such critical stages, and the more preparation required, the further in advance the appointment must be made. See *Avery* v. *Alabama*, 308 U.S. 444, 446 (1940). But the Sixth Amendment right does not require establishing an attorney-client relationship from the first instant of pretrial confinement in order to fend off future indictment and prosecution. *Gouveia*, 467 U.S., at 191. This is because the right to counsel does not in the first instance directly protect citizens' liberty interests; citizens' liberty is protected by the Fourth Amendment's prohibition on unreasonable seizures and the Sixth Amendment guarantee of a speedy trial. *Ibid.*; *Gerstein*, 420 U.S., at 124-125; see *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 241 (1973) ("There is a vast difference between those rights that protect a fair criminal trial and the rights guaranteed under the Fourth Amendment."). Instead, the right to counsel protects personal liberty only indirectly, by ensuring that substantial deprivations of liberty—those that would be unreasonable under the Fourth Amendment because of their duration—may only be imposed by the State following a fair trial. See *Johnson* v. *Zerbst*, 304 U.S. 458, 462 (1938).

II. THE PREINDICTMENT ARTICLE 15.17 MAGISTRATION DID NOT CONSTITUTIONALLY ENTITLE ROTHGERY TO THE ASSISTANCE OF COUNSEL.

A. Formal Criminal Proceedings Had Not Begun.

Kirby v. *Illinois* "firmly established that a person's Sixth and Fourteenth Amendment right to counsel attaches only at or after the time that adversary judicial proceedings have been initiated against him." 406 U.S., at 688. *Kirby* thus affirmed the general rule that the right to counsel attaches at the point that formal charges are filed. See *Harvey*, 494 U.S., at 358, n.5 (Stevens, J., dissenting) ("[T]he 'criminal prosecution' to which the Sixth Amendment refers begins when formal charges are filed."). In Rothgery's case, it cannot reasonably be disputed that there was no criminal prosecution at the time of his arrest and magistration. There were no charges filed or pending, and the affidavit of probable cause filed by the arresting police officer was unquestionably insufficient as a formal charging instrument under controlling Texas law. SJ Ex. A. The preliminary character of this stage of the investigation failed to satisfy the Sixth Amendment's textual prerequisite for the right to counsel—existence of a criminal prosecution. Therefore, "consistent . . . with the literal language of the Amendment, which requires the existence of both a 'criminal prosecutio[n]' and an 'accused,'" *Gouveia*, 467 U.S., at 188 (alteration in original), Rothgery derived no right to counsel from his preindictment article 15.17 appearance.

In Texas, the filing of a probable-cause affidavit to justify a warrantless arrest does not constitute the

filing of formal criminal charges against a suspect. "The Texas Constitution requires that, unless waived by the defendant, the State must obtain a grand jury indictment in a felony case." *Teal* v. *State*, 230 S.W.3d, at 174; see Tex. Const., Art. I, §10. Felonies thus may only be formally charged in Texas courts by indictment or, upon waiver, by information.[4] An indictment is "the written statement of a grand jury accusing a person therein named," Tex. Code Crim. Proc. art. 21.01; it must, at a minimum, satisfy nine formal requirements specified by statute, *id.* art. 21.02. An information, which must be "filed and presented in behalf of the State [of Texas] by the district or county attorney," *id.* art. 21.20, must comport with a similar list of formal requirements, including "[t]hat it appear to have been presented by the proper officer," *id.* art. 21.21(3).

The probable-cause affidavit filed to document the justification for Rothgery's warrantless arrest cannot constitute a formal felony charging document in Texas courts. It is plainly neither an indictment nor an information, and so it could not formally charge Rothgery with a felony under Texas law. See Tex. Const., Art. I, §10. Nor could anything else in an article 15.17 appearance following warrantless arrest be interpreted as constituting a formal charge.

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[4] Complaints, which are affidavits sworn before a magistrate in support of an arrest warrant, may play a role in signaling a commitment to prosecute, when filed by a district or county attorney, but they are not themselves formal charging documents. See Tex. Code Crim. Proc. art. 15.04. "[T]he process of prosecution is usually initiated by the filing of a criminal 'complaint.' But the complaint in [felony] proceedings will serve only as a basis for the issuance of an information or the commencement of the indictment process." *Boseman*, 830 S.W.2d, at 591; see Tex. Code Crim. Proc. art. 21.22.

Indeed, Rothgery was directly told that he had not yet been charged. SJ Ex. B.

In light of the absence of any formal charge in this case, it is clear that Rothgery's article 15.17 appearance did not constitute one of the "criminal prosecutions" to which the Sixth Amendment is limited. U.S. Const., Amdt. 6. "It is the commencement of a formal prosecution, indicated by the initiation of adversary judicial proceedings, that marks the beginning of the Sixth Amendment right." *Texas* v. *Cobb*, 532 U.S. 162, 176 (2001) (Kennedy, J., concurring). Arrest and detention alone are insufficient to activate the Sixth Amendment's protections, because they are investigatory steps that precede the beginning of an actual criminal prosecution. In contrast, the prosecutions that do implicate the amendment are inextricably linked to the formal charging processes that define their initiation. See *Harvey*, 494 U.S., at 358, n.5 (Stevens, J., dissenting). "[T]he literal language of the Amendment . . . requires the existence of both a 'criminal prosecutio[n]' and an 'accused,'" *Gouveia*, 467 U.S., at 188, but neither exists at the time of an article 15.17 appearance following a warrantless arrest.

B. The Right to Counsel Did Not Attach Because There Was No Commitment to Prosecute at the Time of Rothgery's Preindictment Magistration.

While in *Kirby* the Court generally considered the right to counsel to be "historically and rationally applicable only after the onset of formal prosecutorial proceedings," 406 U.S., at 690, it has also pragmatically recognized that the need to extend the

right may arise "from changing patterns of criminal procedure and investigation that . . . tend[] to generate pretrial events that might appropriately be considered to be parts of the trial itself," *Ash*, 413 U.S., at 310.

Kirby accordingly provided a functional analysis for determining whether a specific preindictment event so implicated a suspect's right to a fair trial that it merited the protection of the right to counsel. The Sixth Amendment right to counsel attaches, and adversary judicial proceedings are initiated, when "the government has committed itself to prosecute," and "the adverse positions of government and defendant have solidified." *Kirby*, 406 U.S., at 689.[5] "It is then that a defendant finds himself faced with the prosecutorial forces of organized society" and is "immersed in the intricacies of substantive and procedural criminal law."[6] *Ibid.*; cf. *Johnson* v.

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[5] See also *State* v. *Pierre*, 277 Conn. 42, 95, 890 A.2d 474, 507 (2006) ("[W]e conclude that it is not simply the signing of the information document that triggers the protections of the sixth amendment. Rather, it is the state's decision to move forward with the prosecution of the crimes charged in the information document, by arraigning the suspect and filing the information with the court, that signifies the state's commitment to prosecute as well as the initiation of the adversary judicial proceedings that trigger a defendant's right to counsel under the sixth amendment."); *State* v. *Masaniai*, 63 Haw. 354, 360-361, 628 P.2d 1018, 1023 (1981) (finding no attachment of right to counsel after arrest pursuant to warrant because there had been no prosecutorial involvement in procuring the warrant).

[6] Rothgery's proposed bright-line test, which would find attachment of the right to counsel at any initial appearance before a magistrate, would essentially nullify *Kirby*'s extended discussion of why the test for attachment is not "a mere formalism." See 406 U.S., at 689-690. Nor is this nullifying effect limited to *Kirby*. *E.g.*, *Moran* v. *Burbine*, 475 U.S. 412,

Zerbst, 304 U.S., at 463 ("It embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, *wherein the prosecution is presented by experienced and learned counsel.*" (emphasis added)). Specific applications of this functional analysis have resulted in the recognition of the right to counsel for a very limited set of specific preindictment situations, including adversarial preliminary hearings. See, *e.g.*, *Coleman*, 399 U.S., at 9-10. But applying *Kirby*'s functional analysis to Rothgery's preindictment article 15.17 appearance makes clear, as the Fifth Circuit correctly determined, that the right to counsel had not attached.

"[U]ntil such time as the 'government has committed itself to prosecute, and . . . the adverse positions of government and defendant have solidified' the Sixth Amendment right to counsel does not attach." *Moran* v. *Burbine*, 475 U.S. 412, 432 (1986) (quoting *Gouveia*, 467 U.S., at 189). Any possible claim that the State was committed to prosecuting Rothgery is undermined by the tentative, administrative, and preliminary nature of the article 15.17 appearance and by the uncontested fact that prosecutors had not even considered charging, let alone formally charged, Rothgery at the time of his appearance. Pet. App. at 6. The article 15.17 appearance, which follows every arrest in Texas, fails every aspect of the functional analysis *Kirby* prescribes for events before the filing of formal charges.

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432 (1986); *Gouveia*, 467 U.S., at 189; *Ash*, 413 U.S., at 310; see also Part III *infra*.

First, the government had not committed itself to prosecute. There is no role for a prosecutor either in the process preceding an article 15.17 appearance or at the appearance itself. It is thus impossible to argue that the State commits itself to prosecute at every such appearance following a warrantless arrest. Indeed, given that state law requires such an appearance for every arrestee, see Tex. Code Crim. Proc. arts. 14.06, 15.17, that argument amounts to the claim that the State has statutorily committed to prosecute *every* suspect arrested by the police. That claim is implausible and directly contrary to Texas law and practice. In Texas, as elsewhere, the decision whether or not to initiate a prosecution remains "the *quintessential function* of a prosecutor." *Clawson* v. *Wharton County*, 941 S.W.2d 267, 272 (Tex. App. 1996) (emphasis added); accord Tex. Code Crim. Proc. arts. 2.01, 2.02 (providing that district and county attorneys represent the State in criminal cases). Prosecutors unquestionably played no role in Rothgery's case before or at his article 15.17 appearance. See Pet. App. at 6.

Nor is this conclusion changed by the arresting officer's affidavit of probable cause that was approved by the magistrate. SJ Ex. A. Because the probable-cause determination does not commit the State to prosecute, it does not cause the right to counsel to attach. The officer's providing evidence to a neutral magistrate is required to justify any warrantless detention under *Gerstein*. 420 U.S., at 114. *Gerstein* requires specification of an offense: "The standard for arrest is probable cause, defined in terms of facts and circumstances sufficient to warrant a prudent man in believing that the suspect had committed or was committing an offense." *Id.*, at 111 (quotation, alteration omitted). But *Gerstein* also

makes very clear that "[b]ecause of its limited function and its nonadversary character, the probable cause determination is not a 'critical stage' in the prosecution that would require appointed counsel." *Id.*, at 122. Exercising prosecutorial discretion is a key function of a district or county prosecutor, and the State cannot be committed to prosecuting by a police officer's decision to detain a suspect on probable cause. And, since the probable-cause determination does not reflect a commitment to prosecute, it does not require the immediate appointment of counsel. *Ibid.*; *Kirby*, 406 U.S., at 689.[7]

Second, the adverse positions of the State and the suspect have not solidified at the point of an article 15.17 appearance following a warrantless arrest. Even if a prosecutor had considered whether to bring charges prior to such an appearance, the precise nature of the charges to be filed could well remain unclear. See *State* v. *Tucker*, 137 N.J. 259, 290, 645 A.2d 111, 127 (1994) (noting that even after the filing of a criminal complaint roughly half of all cases are dismissed, downgraded, or diverted to pretrial intervention programs). Based on what the police knew, Rothgery could have been charged, as he eventually was, with the felony of unlawful possession of a firearm by a felon, Tex. Penal Code §46.04, but he might also have been charged with the distinct misdemeanor of unlawful carrying of a

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[7] *State* v. *Luton*, 83 Haw. 443, 449-450, 927 P.2d 844, 850-851 (1996) ("The prosecution does not initiate charges against a defendant at a [*Gerstein* hearing], a non-adversarial proceeding which serves only to determine if future incarceration is warranted."); *id.*, at 450, n.17, 927 P.2d, at 851, n.17 (citing cases from other jurisdictions reaching similar holdings).

weapon regardless of his criminal record, *id.* §46.02. Because of the offense-specific nature of the Sixth Amendment right to counsel, such uncertainty has critical effects on the scope of the right itself, as well as on the responsibilities of police and prosecutors after the right attaches. See *Cobb*, 532 U.S., at 167-168. Indeed, had Rothgery been charged with the alternative misdemeanor count instead, he would have had no constitutional right to appointed counsel, unless he was later sentenced to a term of imprisonment after being convicted of that charge. See *Scott* v. *Illinois*, 440 U.S. 367, 369 (1979). The fact that no prosecutor had chosen from among the potential charges in Rothgery's case makes clear that the government's position toward him had not solidified at the time of his initial article 15.17 appearance.

Third, the article 15.17 appearance is not one at which the arrestee "finds himself faced with the prosecutorial forces of organized society." *Kirby*, 406 U.S., at 689. As with every Texas arrestee, Rothgery's article 15.17 appearance was a primarily administrative matter. He stood in front of a "little glass window," filled out forms, and listened to the magistrate give him various warnings required by *Miranda* and Texas law.[8] SJ Opp. Ex. 3 at 64. No prosecutorial forces of any sort were arrayed against him at the little glass window when he stood before the magistrate. Pet. App. at 6. And more generally, consistent with *Gerstein*, the article 15.17 appearance

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[8] The magistrate also reviewed the affidavit submitted by the arresting officer and concluded that it was sufficient to establish probable cause, although it is not clear whether he did so immediately before or while Rothgery appeared before him. Tex. Code Crim. Proc. art. 15.17; SJ Ex. A.

is nonadversarial, includes no examination or cross-examination of witnesses, and risks no prejudice to any rights of the suspect affecting a fair trial. These same "critical factors" led the Court in *Gerstein* to distinguish probable-cause hearings from the preliminary hearings described in *Coleman* v. *Alabama*, and conclude that no right to counsel attached to them. See *Gerstein*, 420 U.S., at 122-123.

Finally, an article 15.17 magistration does not immerse the accused in "the intricacies of substantive and procedural criminal law," *Kirby*, 406 U.S., at 689, or subject him to "a trial-like adversary confrontation" to which the right to counsel ought be extended, *Ash*, 413 U.S., at 317. Rothgery, like other suspects given warnings under article 15.17, merely received a summary of his procedural rights, including his *Miranda* rights to counsel and to remain silent, his right to request the appointment of counsel, and his right to challenge the probable cause to charge him at an examining trial.[9] See Tex. Code Crim. Proc. art 15.17(a) (prescribing warnings to be addressed to the arrestee); SJ Ex. B. Rothgery was not, and no other suspect at an article 15.17 magistration is, placed into a position in which his lack of legal knowledge could have any prejudicial effect on his right to a fair trial, should he eventually be formally charged.

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[9] The examining trial is the procedure under Texas law by which an accused may choose to challenge the existence of probable cause to charge him with a crime. Tex. Code Crim. Proc. art. 16.01. It is an adversarial preliminary hearing at which witnesses may be examined and cross-examined, with the same rules of evidence as apply at trial, in the presence of the accused. *Id.* arts. 16.06-16.08. The accused's right to counsel at an examining trial is guaranteed both statutorily, *id.* art. 16.01, and constitutionally, see *Coleman*, 399 U.S., at 9-10.

When this Court has extended the right to counsel, it has been after "a pragmatic assessment of the usefulness of counsel to the accused at the particular proceeding, and the dangers to the accused of proceeding without counsel." *Patterson*, 487 U.S., at 298. The four practical criteria noted by *Kirby* guide this assessment, and the fact that they clearly do not apply dictates that an article 15.17 appearance following warrantless arrest is not one of those pretrial proceedings that mark the initiation of adversary judicial proceedings.

In contrast, adversarial preindictment proceedings, like the preliminary hearing considered in *Coleman*, are an example of the type of proceedings that satisfy *Kirby*'s analysis for determining when adversary judicial proceedings have begun. 399 U.S., at 9-10. The clear differences between the proceedings governed by *Coleman* and the article 15.17 appearance confirm that the article 15.17 appearance is not an event from which "counsel's absence might derogate from the accused's right to a fair trial." *Wade*, 388 U.S., at 226.

Coleman provided four reasons why an adversarial preliminary hearing, at which the State's evidence is evaluated for sufficiency to indict or otherwise formally file charges, is sufficient to initiate adversary judicial proceeding:

> (1) "the lawyer's skilled examination and cross-examination of witnesses may expose fatal weaknesses in the State's case that may lead the magistrate to refuse to bind the accused over";
>
> (2) "the skilled interrogation of witnesses by an experienced lawyer can fashion a vital impeachment tool for use in cross-examination of

> the State's witnesses at the trial, or preserve testimony favorable to the accused of a witness who does not appear at the trial";
>
> (3) "trained counsel can more effectively discover the case the State has against his client and make possible the preparation of a proper defense to meet that case at the trial"; and
>
> (4) "counsel can also be influential at the preliminary hearing in making effective arguments for the accused on such matters as the necessity for an early psychiatric examination or bail." 399 U.S., at 9.

The article 15.17 appearance allows no presentation of witness testimony and provides no opportunity to expose weaknesses in the government's evidence, create a basis for later impeachment, or even engage in basic discovery. Because "the prosecution is not required to produce witnesses for cross-examination" at the *Gerstein* probable-cause determination that accompanies magistration following a warrantless arrest, the considerations in *Coleman* that motivated recognition of the right to counsel at adversarial preliminary hearings do not apply at the article 15.17 appearance. *Gerstein*, 420 U.S., at 123.[10] Moreover, magistration "is addressed only to pretrial custody," and so "does not present the high probability of substantial harm" to the right to fair trial presented by a *Coleman* preliminary hearing, at which a finding of no probable cause "could mean that [a suspect] would not be tried at all." *Ibid.*

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[10] In Texas, the proceeding analogous to a preliminary hearing subject to *Coleman* is an examining trial, not the article 15.17 magistration.

Of the four bases identified in *Coleman* as justifying extension of the right to counsel, only one, counsel's ability to influence the decision to grant bail, is applicable to article 15.17 appearances. And because that rationale implicates the suspect's liberty interest, rather than his right to a fair trial, it is insufficient to justify the blanket extension of the right to counsel to the article 15.17 appearance. Indeed, to extend the right on that basis would require the extension of the right to counsel to *all* bail hearings. That would contradict the Court's suggestion that combining a bail hearing with a probable-cause hearing does not require appointment of counsel. *Gerstein*, 420 U.S., at 123-124; see *United States* v. *Hooker*, 418 F.Supp. 476, 479 (MD Pa. 1976), aff'd mem., 547 F.2d 1165 (CA3); *Fenner* v. *State*, 381 Md. 1, 20, 846 A.2d 1020, 1031 (2004); *Padgett* v. *State*, 590 P.2d 432, 436 (Alaska 1979); Colbert, Thirty-Five Years After *Gideon*: The Illusory Right to Counsel at Bail Proceedings, 1998 U. Ill. L. Rev. 1, 3. "[T]he fact that the outcome of a proceeding may result in loss of liberty does not by itself, even in civilian life, mean that the Sixth Amendment's guarantee of counsel is applicable."[11] *Middendorf* v. *Henry*, 425 U.S. 25, 35 (1976).

Rothgery's practical arguments against the proper application of *Kirby*'s pragmatic assessment are no more convincing than his doctrinal ones. Rothgery attacks a standard founded on commitment to

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[11] This conclusion is not altered by the fact that Rothgery had, and waived, a Texas statutory right to consult with counsel before his bail was set. See Tex. Code Crim. Proc. art 15.17(a). The existence of that statutory right does not indicate that the Sixth Amendment right to counsel had attached at the time of magistration.

prosecution as inherently unworkable, arguing that any such test would necessarily devolve into an "intrusive inquiry into prosecutors' deliberations and communications." Pet'r Br. at 38. But the properly formulated test is not, as in Rothgery's caricature, merely whether prosecutors have had any involvement in the case whatsoever, but instead whether the State has objectively committed itself to prosecute. *Kirby*, 406 U.S., at 689. Prosecutorial involvement is merely one form of evidence of such commitment. And *Kirby* provides other objective and easily employed benchmarks for gauging the State's commitment to prosecute: the filing of formal charges, whether by information, indictment, or formal complaint, or the holding of an adversarial preliminary hearing to determine probable cause to file such charges. *Ibid.* "The return of an indictment, or like instrument, substantially alters the relationship between the state and the accused. Only after a formal accusation has 'the government . . . committed itself to prosecute, and only then [have] the adverse positions of government and defendant . . . solidified.'" *Patterson*, 487 U.S., at 306 (Stevens, J., dissenting) (quoting *Kirby*, 406 U.S., at 689; alterations in original). In the mine-run of criminal cases, these gauges are all that is necessary to accurately indicate when adversary judicial proceedings have begun and the right to counsel attaches.

In any event, Rothgery's misguided pragmatic concerns are not implicated in this case. There clearly was no commitment to prosecute in Rothgery's case, as evidenced not only by the absence of formal charges but also by the prosecutor's lack of involvement in the preparation and filing of the affidavit of probable cause against Rothgery. Pet.

App. at 12 ("Without any evidence to indicate that the [probable cause] affidavit actually served to initiate the prosecution at the time of Rothgery's magistrate appearance, we conclude that the filing of the affidavit was part of the investigatory process, serving solely to validate the arrest without committing the state to prosecute."). Regardless of what some future case might require, the Fifth Circuit on these facts properly applied the *Kirby* test of governmental commitment to prosecution, and by that application correctly determined that Rothgery's right to counsel did not attach at or immediately following his article 15.17 magistration.

Whether considered as establishing a set of formal criteria, or a series of functional guideposts,[12] *Kirby* provides the fundamental framework for determining when a particular procedural step initiates adversary judicial proceedings[13]; and the analysis makes clear that the article 15.17 appearance does not qualify. Unless the arrest is made on an indictment or information, the article 15.17 appearance occurs before formal charges have been lodged, when the government is not yet committed to prosecuting the suspect and the arrestee is not confronted by the prosecutorial forces of society. Thus, under *Kirby*, an article 15.17 appearance following warrantless arrest

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[12] Commentators have recognized that the *Kirby* analysis has both a formal and a functional component. See Metzger, Beyond the Bright Line: A Contemporary Right-to-Counsel Doctrine, 97 Nw. L. Rev. 1635, 1689 (2003).

[13] *Kirby*'s careful consideration starkly contrasts with *Brewer* v. *Williams* and *Michigan* v. *Jackson*, which neither provide nor apply an analytical framework for determining attachment. See Part II.C *infra*.

does not trigger the attachment of the Sixth Amendment right to counsel.

C. Neither *Brewer* v. *Williams* nor *Michigan* v. *Jackson* Requires That the Right to Counsel Attach at an Article 15.17 Appearance Following Warrantless Arrest.

Against the great majority of this Court's Sixth Amendment cases, Rothgery suggests that the initiation of adversarial judicial proceedings is not defined by the government's commitment to prosecute because his magistration "was identical in every meaningful way to the initial 'arraignments'" in *Brewer* v. *Williams* and *Michigan* v. *Jackson*. Pet'r Br. at 11. But the opinions in those cases do not establish that the hearings described in *Brewer*'s dicta and *Jackson*'s one footnote addressing the attachment of the right to counsel are identical to Rothgery's magistration. Moreover, neither of those cases analyzed the nature of the "arraignments" with respect to the issue of attachment.

In *Brewer* v. *Williams*, the issue of whether the defendant's right to counsel had attached was neither raised by the parties before the Court nor disputed in the courts below. 430 U.S. 387, 399 (1977); see also *Williams* v. *Brewer*, 375 F.Supp. 170, 176 (SD Iowa 1974); Brief for Petitioner, No. 74-1263, 1976 WL 181163, at *3 (Feb. 12, 1976); cf. *Cobb*, 532 U.S., at 169 (saying, of *Brewer*, that "[c]onstitutional rights are not defined by inferences from opinions which did not address the question at issue"). For that reason, *Brewer*'s factual statement is vague as to what occurred at the defendant's arraignment. And that means, in turn, that the question was not settled by

the *Brewer* opinion. Cf. *Adams* v. *Robertson*, 520 U.S. 83, 90-91 (1997) (*per curiam*) ("Requiring parties to raise issues below not only avoids unnecessary adjudication in this Court by allowing state courts to resolve issues on state-law grounds, but also assists us in our deliberations by promoting the creation of an adequate factual and legal record."); *Metro. Stevedore Co.* v. *Rambo*, 521 U.S. 121, 136 (1997) ("[T]hat is an issue not addressed by the parties, and it would be imprudent of us to address it now with any pretense of settling it for all time.").

From what we do know, however, it appears that the arraignment in *Brewer* differed from Rothgery's magistration. In *Brewer*, the defendant turned himself in to the police after an arrest warrant had issued charging him with child abduction. 430 U.S., at 390. The defendant was "arraigned" the same day he turned himself in. *Id.*, at 391; 375 F.Supp., at 172. Rothgery assumes that because "Williams had not yet been indicted and was not asked to enter a plea when he made his initial appearance before the court" and because he was "arraigned on a warrant" that this means the hearing was equivalent to Rothgery's magistration. Pet'r Br. at 21, n.8. But under Iowa law an arraignment can occur only after an indictment has been issued or a county attorney has filed an information. *Wright* v. *Denato*, 178 N.W.2d 339, 341 (Iowa 1970) ("Arraignment is a procedural right accorded defendants only after indictment (or the filing of a county attorney's information)."). Because Williams was "arraigned," the Court would likely have concluded or at least assumed that the prosecutor must have at least filed an information charging the defendant with child abduction. Although it is true that Williams had not yet been indicted for first-degree murder (for which

he was later convicted), *Brewer*, 430 U.S., at 393, neither the parties' briefs nor the courts' opinions reflect that the arrest warrant on which he was arraigned was not supported by a county attorney's information on the child-abduction charge for which he was originally arrested.

There is no basis in *Brewer* for Rothgery's assumption that Williams was not asked to enter a plea. The courts' opinions in *Brewer* do not state one way or the other whether he entered a plea, but they make clear that he was notified of the charge against him. 430 U.S., at 391; 375 F.Supp., at 172. That no other factual detail is provided is unsurprising given that the attachment issue was neither raised nor disputed by the parties. 430 U.S., at 399; 375 F.Supp., at 176.

The important point is that the uncertainty about what happened at the *Brewer* arraignment shows that its discussion of the attachment question is of limited, if any, precedential value. See *Cent. Va. Cmty. Coll.* v. *Katz*, 546 U.S. 356, 363 (2006) (stating that the Court is "not bound to follow our dicta in a prior case in which the point now at issue was not fully debated"). Indeed, setting aside the requirements of Iowa criminal procedure, it is impossible to tell if the *Brewer* arraignment is more comparable to Rothgery's magistration or to the arraignment held to trigger the Sixth Amendment right to counsel in *Hamilton* v. *Alabama*, 368 U.S. 52 (1961).[14] *Brewer*'s lack of clarity on this point is underscored by the fact that less than a year after

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[14] At the arraignment in *Hamilton* the defendant was required to raise certain defenses at the hearing or otherwise waive them. 368 U.S., at 53.

Brewer was decided, the Court did not even cite *Brewer* when analyzing whether adversary judicial proceedings had been initiated for Sixth Amendment purposes in *Moore* v. *Illinois*, 434 U.S. 220, 228 (1977). If *Brewer* were as clear as Rothgery assumes, *Moore* simply could have cited *Brewer* and easily concluded the hearing in *Moore* caused the right to counsel to attach. *Moore*, however, did not even mention *Brewer*. Grano, *Rhode Island* v. *Innis*: A Need to Reconsider the Constitutional Premises Underlying the Law of Confessions, 17 Am. Crim. L. Rev. 1, 29, n.172 (1979).

Equally misplaced is Rothgery's reliance on a single footnote in *Michigan* v. *Jackson*. 475 U.S. 625, 629, n.3 (1986). First, the primary question considered was whether the no-waiver rule of *Edwards* v. *Arizona*, 451 U.S. 477 (1981), applies in the Sixth Amendment context to "a defendant *who has been formally charged with a crime*." *Jackson*, 475 U.S., at 626 (emphasis added). In *Jackson*, there was an arraignment that preceded the events at issue. There is no Texas arraignment procedure in the normal chronology leading to an article 15.17 appearance following a warrantless arrest, nor was there one in Rothgery's specific case. See Tex. Code Crim. Proc. art. 26.01 (defining arraignment under Texas law as a postindictment procedure).

The hearing that *Jackson* said initiated adversarial judicial proceedings differed in two critical respects from Rothgery's magistration. First, it gave the defendant the right to answer the charges—under Michigan law, the defendant in *Jackson* had to "be given an opportunity publicly to make any statement and answer any questions regarding the charge that he may desire to answer." Mich. Comp. Laws §764.26

(quoted in *People* v. *Mallory*, 421 Mich. 229, 238-239, 365 N.W.2d 673, 677 (1984)). Article 15.17, on the other hand, does not provide any similar opportunity to speak or answer questions regarding the charge. Second, at the hearing in *Jackson*, the court entered a plea of not guilty on behalf of the defendant. Brief for Petitioner, No. 84-1539, 1985 WL 669876, at *3-*4 (July 12, 1985). No plea was entered (or even allowed) at Rothgery's appearance.

D. Rothgery's Waiver of Counsel at the Preindictment Article 15.17 Appearance Eliminated Any Right to Appointment Until a Subsequent Critical Stage.

Rothgery's knowing and intelligent waiver of the right to counsel obviated the need for appointment of counsel at the Article 15.17 appearance. And, because no proceedings or interrogations occurred between the preindictment and postindictment article 15.17 appearances, no intervening event required appointment to protect Rothgery's right to a fair trial. Thus, the County had no constitutional obligation to appoint counsel for Rothgery before it did so.[15]

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[15] Rothgery attempts to frame the question presented to this Court solely in terms of attachment, without reference to appointment. But Rothgery's constitutional claim is not that the County prevented his right to counsel from attaching, but that it violated his Sixth Amendment right by not appointing him counsel. Compl. at 8-9. And this Court's prior cases uniformly have addressed whether the right was violated by deciding whether it was necessary to appoint counsel in the context of specific proceedings and events, not by deciding abstract questions about attachment. Indeed, Rothgery's own argument relies substantially on emotional arguments about the timing of appointment, as do his amici. *E.g.*, Pet'r Br. at 37,

Kirby and its progeny make clear that the right to counsel requires appointment of counsel only at critical stages of criminal proceedings: the filing of a formal charge, the occurrence of an adversarial preliminary hearing or arraignment, or an interrogation or lineup that follows the government's demonstration of its commitment to prosecute.[16] See *Kirby*, 406 U.S., at 689; *Gouveia*, 467 U.S., at 188-189; *Jackson*, 475 U.S., at 629-630. The critical-stage analysis considers whether "counsel is necessary to preserve the defendant's basic right to a fair trial," focusing on events that can prejudice the fair-trial right. *Wade*, 388 U.S., at 227. Counsel must first be appointed before she can be present at a critical stage, to allow time to prepare to meet her prosecutorial adversary. *E.g.*, *Avery*, 308 U.S., at 446. But the Court has never held, as Rothgery

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40, 43 (arguing that Rothgery and others like him would be disadvantaged without the assistance of counsel); see also Brief of Amicus Curiae Twenty-Four Professors of Law at 4; Brief of Amicus Curiae NACDL at 24-25; Brief of Amicus Curiae Brennan Center for Justice, *et al.* at 25 (all discussing the issue in terms of right to a lawyer); Pet. App. at 12 (Fifth Circuit recognizing connection between attachment and appointment). Thus, the question whether appointment is required immediately upon attachment is not only "fairly included in the question presented," the questions are so intertwined that the issue is "essential to the correct disposition of the other issues in the case." *Missouri* v. *Jenkins*, 515 U.S. 70, 84-85 (1995) (quotation omitted).

[16] The statement in *Jackson* on which Rothgery so heavily relies is not to the contrary. See 475 U.S., at 629, n.3. In context, *Jackson*'s assertion is simply a recognition that the Court was not considering and did not rely on the question whether arraignment under Michigan law constituted a critical stage at which the accused had a right to the presence of counsel. *Ibid.*

presupposes, that, even with no critical stage impending, there is a bright-line rule requiring that counsel be appointed at the moment that the right has attached.

When an accused waives the right to counsel at a given event, as Rothgery did at the article 15.17 appearance, that waiver eliminates any obligation to appoint counsel, because by that waiver the suspect accepts the risk of whatever prejudice to his fair-trial right may inhere at that stage. This means, in turn, that appointment is not constitutionally required until the next point at which the accused risks "potential substantial prejudice" to the "basic right to a fair trial." *Wade*, 388 U.S., at 227. The Court has rightly refused to find that an accused has any right to appointment of counsel in the absence of any of the concerns that motivate the right to counsel, particularly in light of the substantial burden doing so would impose on pending investigations by the police. See *Gouveia*, 467 U.S., at 191 (refusing to adopt a "novel interpretation of the right to counsel" to "provide a defendant with a preindictment private investigator"); *Cobb*, 532 U.S., at 171-172 (noting that "the Constitution does not negate society's interest in the ability of police to talk to witnesses and suspects"). The period between Rothgery's first and second article 15.17 appearances was just such a time—none of those concerns were present, because there was no intervening event posing any "potential substantial prejudice" to Rothgery's right to a fair trial until the indictment, which was followed by the

County's timely appointment of counsel to represent Rothgery.[17]

Rothgery claims that despite his waiver, his preindictment article 15.17 appearance entitled him to precisely that "preindictment private investigator" that *Gouveia* said he should not get. 467 U.S., at 191. He claims, despite his own waiver, that he had the right to have counsel appointed at a time when nothing was going on. Yet he offers no coherent explanation how, if appointment of counsel was not required at the appearance (either because of his waiver or the appearance's nonadversarial character), it was nonetheless required *after* the hearing, when none of the risks and concerns which motivate the right to counsel were present. See Pet'r Br. at 19-20, n.6 ("The question presented by this case . . . [is] whether Rothgery's initial appearance before the magistrate marked the commencement of adversary judicial proceedings, *after which* his right to counsel attached." (emphasis added)).

The Court has never held that the proceedings at a particular pretrial event can trigger appointment of counsel without the hearing itself being a critical stage. See, *e.g.*, *Coleman*, 399 U.S., at 9-10 (holding that potential prejudice to fair-trial right requires counsel at preliminary hearing); *Hamilton*, 368 U.S., at 54 (same at arraignment). Yet Rothgery is in essence asking the Court to hold that the article 15.17 appearance is a critical stage causing attachment of the right to counsel despite his

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[17] Rothgery essentially seeks to have this period of inactivity treated as a critical stage. See Pet'r Br. at 19, n.6. But the complete absence of any proceedings could not be a critical stage without robbing that phrase of all meaning.

strenuous denial (presumably because of the blunt fact of his waiver) that the question of attachment at the article 15.17 appearance itself is before the Court. In short, the fact of Rothgery's waiver makes this the wrong case in which to decide, as Rothgery seeks, whether an article 15.17 appearance always requires appointing counsel.

Even taken on its own terms, Rothgery's argument necessarily recognizes some gap between the initiation of adversary judicial proceedings, which he claims occurred at the preindictment article 15.17 appearance, and the proper time for appointing counsel. But he offers no justification for his unstated and critical assumption that the time between these two events must be vanishingly small. And that assumption is at odds with the Court's "more pragmatic approach" to Sixth Amendment jurisprudence. *Patterson*, 487 U.S., at 298. Instead, when adversary proceedings begin at an event at which the accused expressly waives counsel, the gap between attachment and appointment naturally lasts until the next critical stage, when the risk for prejudice to the fair-trial right next arises. Put another way, whether Rothgery had a right to demand immediate appointment of counsel after the article 15.17 appearance depends on "whether potential substantial prejudice to [Rothgery's] rights inhere[d]" at that point, and whether the availability of counsel could help to avoid that prejudice. *Wade*, 388 U.S., at 227.

No potential prejudice, let alone substantial prejudice, to Rothgery's right to a fair trial, inhered in the gap between his preindictment and postindictment article 15.17 appearances. His lack of counsel had no impact on "his right meaningfully to

cross-examine the witnesses against him [or] to have effective assistance of counsel at the trial itself." *Wade*, 388 U.S., at 227. There is therefore no basis to arbitrarily determine that appointment was required the instant the article 15.17 appearance concluded. Instead, the Court's right-to-counsel analysis dictates that counsel need not be appointed until the next critical stage at which Rothgery's right to a fair trial might be put at risk. See *ibid.*

The Texas legislature, moreover, carefully mirrored the Court's analysis in crafting Texas's appointment statute. See Tex. Code Crim. Proc. art. 1.051. For indigent defendants not released on bail, the statute requires appointment even prior to initiation of adversary judicial proceedings. *Id.* art. 1.051(i). For those indigents released from custody, however, the statute does not require appointment of counsel until the first court appearance, or the initiation of adversary judicial proceedings (whichever comes first). *Id.* art. 1.051(j). Rothgery's claim that counsel must be appointed at magistration nullifies article 1.051(j), because under Rothgery's theory every time an arrestee is magistrated and admitted to bail, adversary judicial proceedings are initiated.

Rothgery waived any Sixth Amendment right to counsel he may have had at the preindictment article 15.17 appearance, and appointment was appropriate at the second, postindictment article 15.17 appearance. The delay in appointing counsel therefore did not violate Rothgery's Sixth Amendment right to counsel.

This conclusion is not altered by Rothgery's claim that *Michigan* v. *Jackson* requires appointment to follow attachment irrespective of whether any critical stage has or is soon to occur. Rothgery points to an

equivocal footnote in *Jackson*, in which the Court wrote, while holding that the right to counsel attaches at arraignment, that "[t]he question whether arraignment signals the initiation of adversary judicial proceedings . . . is distinct from the question whether the arraignment itself is a critical stage requiring the presence of counsel, absent a valid waiver." *Jackson*, 475 U.S., at 629, n.3. But this statement says nothing about whether attachment requires immediate appointment. And in fact *Jackson* rejects any notion that appointment should be detached from critical stages.

The question in *Jackson* was whether counsel was required at an interrogation after an arraignment, when the accused had asserted the right. *Id.*, at 636. The defendants did not argue that counsel should have been appointed for the period between arraignment and interrogation. Instead, *Jackson* adopts the view that post-arraignment interrogation itself constituted a "critical stage" that activated the right to counsel that had been dormant since it attached at the arraignment. *Id.*, at 629-630. The Court subsequently confirmed this understanding that a defendant's Sixth Amendment right can attach without counsel actually being appointed, so long as no critical stage occurs: "The fact that petitioner's Sixth Amendment right came into existence with his indictment, *i.e.*, that he had such a right at the time of his questioning, does not distinguish him from the preindictment interrogatee whose right to counsel is in existence and available for his exercise while he is questioned." *Patterson*, 487 U.S., at 290-291.

The latent nature of the right to counsel between the initiation of adversary judicial proceedings and the first critical stage of those proceedings finds

support in common practices in the American criminal justice system that have never been seriously questioned. On Rothgery's logic, for instance, appointment of counsel would automatically occur upon indictment, when attachment of the right to counsel is abundantly clear. But there is no doubt that there is no responsibility to appoint counsel to an indicted fugitive even though the right to counsel has clearly attached, and it is no violation of his constitutional rights to delay appointment until after his apprehension. Similarly, while the right to counsel attaches upon return of a sealed indictment, appointment of counsel is not required until the indictment is unsealed unless a critical stage, such as interrogation, intervenes. See *United States* v. *Arnold*, 106 F.3d 37, 41 (CA3 1997), overruled on other grounds by *Cobb*, 532 U.S., at 168.

The Sixth Amendment right to appointment of counsel is triggered only by a critical stage of proceedings (including interrogation) following the initiation of adverse judicial proceedings. No critical stage (not even an attempted interrogation) intervened during the period between Rothgery's preindictment magistration and the return of the indictment against him. Thus, even if the right could be said, in a hypertechnical sense, to have "attached" at or after the article 15.17 appearance, nothing happened at or after that hearing that required the appointment of counsel until Rothgery was actually indicted—at which point counsel was timely appointed.

III. ROTHGERY'S PROPOSED EXTENSION OF THE SIXTH AMENDMENT RIGHT TO COUNSEL IS UNWARRANTED, UNWORKABLE, AND UNWISE.

The rule proposed by Rothgery, that the Sixth Amendment right to counsel attaches whenever "an arrested person makes an initial appearance before a judge who informs him of the accusation against him and requires him to remain in jail or post bail to ensure that he answers that accusation," Pet'r Br. at 20, would have far-reaching negative consequences both for legal doctrine and in real-world practice. It would unnecessarily disrupt this Court's well-considered and well-understood framework defining the right to counsel, in order to safeguard an already-protected liberty interest not traditionally part of Sixth Amendment analysis. It would invite vexatious litigation, including interlocutory appeals, habeas corpus claims, and §1983 suits under circumstances in which no quantifiable injury has occurred. And it would impose significant, unnecessary costs on governmental entities forced to pay for defense lawyers even in the absence of criminal proceedings against a suspect.

A. Rothgery's Proposed Rule Would Conflict with This Court's Sixth Amendment Precedents.

The Fifth Circuit's determination that Rothgery's right to counsel did not attach at his preindictment article 15.17 appearance is entirely congruent with relevant Sixth Amendment precedents. See Part II *supra*. Rothgery's arguments, in contrast, directly contradict several longstanding precedents interpreting the States' obligations under the Sixth Amendment.

In particular, because Rothgery's proposed rule would extend the right to counsel to any probable-cause hearing before a magistrate, it directly contradicts *Gerstein*'s indication that counsel need not be appointed at a nonadversarial probable-cause hearing. See 420 U.S., at 122-124. Rothgery's proposed rule would also essentially overrule *Kirby* v. *Illinois*. *Kirby*'s core holding was that there is no right to counsel at investigatory lineups conducted prior to the initiation of adversary judicial proceedings. 406 U.S., at 690. But the standard nationwide practice is to bring arrestees before a magistrate within 24 to 48 hours of arrest. 4 W. LaFave *et al.*, Criminal Procedure §14.2(a), n.5 (2d ed. 1999). Thus, if Rothgery's rule were to be adopted, counsel *would* be required for any investigatory lineups after a magistration—that is, routinely.

Rothgery's position also clashes with *Scott* v. *Illinois*. Under *Scott*, "the Federal Constitution does not require a state trial court to appoint counsel" in a "case where a defendant is charged with a statutory offense for which imprisonment upon conviction is authorized but not actually imposed." 440 U.S., at 369. But Rothgery's proposed blanket rule is that the right to counsel attaches at the point of an initial appearance regardless of whether the defendant has been charged with a felony, and is violated by a failure to appoint counsel at that point regardless of whether imprisonment is ultimately imposed. Indeed, in Rothgery's case, the State, through the prosecutor, had the discretion to decide to charge him with the misdemeanor of unlawful possession of a firearm and not seek jail time. Tex. Penal Code §46.02; *id.* §12.21 (allowing imposition of a fine only). Rothgery's rule would cramp that discretion, and

contradict *Scott*, by forcing the State to appoint a lawyer before it had even decided either to prosecute him for a felony or seek jail time.

Similarly, Rothgery's rule would also breathe new life into the Sixth Amendment reading of *Escobedo*, 378 U.S., at 485-486, which extended the right to counsel to preindictment interrogations, even though that understanding of *Escobedo* was subsequently repudiated by *Johnson* v. *New Jersey*, see *Moran*, 475 U.S., at 429. In doing so, moreover, Rothgery's rule would also functionally adopt *Miranda*'s repudiated holding that "custodial interrogation [marks] the true beginning of adversarial proceedings." *Gouveia*, 467 U.S., at 194 (Stevens, J., concurring in the judgment); *Moran*, 475 U.S., at 429-430 ("[S]ubsequent decisions foreclose any reliance on *Escobedo* and *Miranda* for the proposition that the Sixth Amendment right, in any of its manifestations, applies prior to the initiation of adversary judicial proceedings.").

B. The Liberty Interest Rothgery Seeks to Vindicate Is Properly and Adequately Protected by Other Constitutional and Statutory Rights.

Worse still, these disruptions of well-settled precedent are unnecessary, because the interests Rothgery seeks to protect are already adequately protected by other rights. At its core, Rothgery's claim appeals to the notion that he should not have had to wait the intervening five months while out on bail to be appointed a lawyer, but instead should have had a lawyer appointed to begin investigating the background facts underlying the possible charges

against him.[18] As explained, that is not an interest the Sixth Amendment right to counsel protects. Rothgery also leans heavily on the concern that "[u]nder [the Fifth Circuit's] rule, an indigent defendant who is innocent of the charges against him could nevertheless sit in jail for months awaiting indictment 'because he does not know how to establish his innocence.'" Pet'r Br. at 42. That is, Rothgery urges the Court to look beyond the circumstances of his own case and extend the right to counsel to protect a general liberty interest against preindictment confinement. But other protections already combine to prevent that harm of which Rothgery warns.

First, the Fourth Amendment protects against "unreasonable searches and seizures." U.S. Const., Amdt. 4. This Court specifically approved in *Gerstein* the situation in which "a person [is] arrested and *held for trial*" upon a showing of probable cause, even when such detention amounted to an "extended restraint of liberty following arrest."[19] 420 U.S., at 111, 114 (emphasis added). And it is beyond dispute that "the Government has a substantial interest in

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[18] In particular, Rothgery invites the Court to consider a secondhand anecdote claiming that a person spent 27 days in jail before counsel was appointed. Pet'r Br. at 42 (describing a "story told" to the authoring committee). This purported event occurred before the enactment of the Texas Fair Defense Act of 2001, which requires the appointment of counsel to indigents held in jail. Tex. Code Crim. Proc. art. 1.051(i). And the concern Rothgery raises about people languishing in jail without lawyers is inapposite to this case, as Rothgery was free on bail during the period he claims that the County was constitutionally required to appoint him a lawyer.

[19] The existence of probable cause to detain Rothgery at the time of his initial arrest is uncontroverted.

nsuring that persons accused of crimes are available for trials . . . or that confinement of such persons pending trial is a legitimate means of furthering that interest." *Bell* v. *Wolfish*, 441 U.S. 520, 534 (1979). Adapting the Sixth Amendment right to counsel to protect a suspect's liberty interest in these circumstances would thus extend the Sixth Amendment right to counsel even beyond the bounds of the Fourth Amendment.

Next, the Sixth Amendment separately ensures the right to a speedy trial. .That guarantee provides another important defense for a suspect's liberty, acting "to prevent undue and oppressive incarceration prior to trial" and "to minimize anxiety and concern accompanying public accusation." *United States* v. *Marion*, 404 U.S. 307, 320 (1971). The degree of overlap between these stated goals and the harms alleged by Rothgery is noteworthy, because in essence Rothgery is attempting to assert a speedy trial claim that would normally be barred. See *Doggett* v. *United States*, 505 U.S. 647, 652, n.1 (1992) (noting that postaccusation delay is not generally considered presumptively prejudicial less than a year after triggering the right to a speedy trial). But, again, "the speedy trial right and the right to counsel protect different interests. While the right to counsel exists to protect the accused during trial-type confrontations with the prosecutor, the speedy trial right exists primarily to protect an individual's liberty interest," like the interest Rothgery asserts here. *Gouveia*, 467 U.S., at 190. Rothgery's argument implicitly reconceptualizes the purpose of the Sixth Amendment right to counsel, so that it no longer focuses on protecting the right to a fair trial, but on protecting the liberty interests of the accused—which already fall within the ambit of

the right to a speedy trial. That "fundamentally misconceive[s] the nature of the right to counsel guarantee." *Id.*, at 189.

Moreover, state statutes of limitations, in addition to federal constitutional rights, safeguard against unreasonable delay in prosecuting criminal cases. "[T]he applicable statute of limitations . . . is . . . the primary guarantee against bringing overly stale criminal charges," and such statutes likewise guarantee an upper limit on the possible duration of any preindictment detention. *Marion*, 404 U.S., at 322 (quoting *United States* v. *Ewell*, 383 U.S. 116, 122 (1966)). More directly applicable are state-law speedy trial guarantees, such as Article 32.01 of the Texas Code of Criminal Procedure, which requires dismissal of charges and discharge from custody or bail if formal charges are not filed within 180 days or the end of the first term of court after arrest (whichever is later).

Finally, state statutes also specifically secure the right to counsel to persons held in custody. See Brief of Amicus Curiae NACDL at 1a-7a. Under Texas law, the magistrate will inform an arrestee of his right to counsel and, if counsel is requested, will appoint counsel before the bail-setting portion of the magistration is conducted. Tex. Code Crim. Proc. art. 15.17(a). Further, the Texas Fair Defense Act provides that an indigent person in a rural county is entitled to have counsel appointed within three working days after counsel is requested. *Id.* art. 1.051(i).[20] If an arrestee chooses not to postpone the setting of bail to await the appointment of counsel,

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[20] In counties with more than 250,000 people, counsel must be appointed within one working day of the request. *Id.* art. 1.051(i).

the arrestee may (as Rothgery did) waive his statutory right to counsel at the magistration without prejudicing his later right to request the appointment of counsel at subsequent judicial proceedings. *Id.* art. 1.051(h).[21]

In short, several protections combine to fend off Rothgery's specter of innocent indigents languishing in Texas county jails for lack of appointed counsel. "[P]retrial delay is often both inevitable and wholly justifiable," *Doggett*, 505 U.S., at 656, and the existing procedural protections are sufficient (and designed) to protect suspects from an unreasonable detention, a delay in prosecution, or a combination of the two. And, just as important, "the major evils" against which these protections guard "exist quite apart from [the] actual or possible prejudice to an accused's defense" which motivates the right to counsel. *Marion*, 404 U.S., at 320. Because of the adequacy of existing constitutional and statutory protections, there is no need to deform the right to counsel to serve a liberty interest it was not designed to safeguard.

C. Rothgery's Proposed Extension of the Right to Counsel Would Open the Door to Future Undesirable Extensions of That Right.

Rothgery's proposed alteration to the scope of the right to counsel would open the door to further

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[21] The purported differences between Texas's procedures from other states cannot justify constitutionalizing the majority practice. See *Estes* v. *Texas*, 381 U.S. 532, 587 (1965) (Harlan, J., concurring) ("Forbidding this innovation, however, would doubtless impinge upon one of the valued attributes of our federalism by preventing the States from pursuing a novel course of procedural experimentation.").

extensions even to the time of arrest. First, his logic clearly would make the right applicable to a bail hearing. It makes no sense to think that the right to counsel must attach *following* a judge's commitment of a suspect to bail in order to protect that suspect's liberty interest, without also concluding that protecting that liberty interest likewise requires the presence of counsel *at* the bail hearing.

Moreover, reconfiguring the Sixth Amendment right to counsel as a protector of liberty interests, rather than of the right to a fair trial, makes Rothgery's proposed extension a jumping-off point for many new procedural rights and prophylactic rules untethered from the text and purpose of the Amendment itself. For example, Rothgery's logic could easily be extended past the bail hearing to the point of arrest on a warrant. Rothgery's theory is that the right attaches when there is a judicial determination of probable cause to believe a specific offense has been committed, with communication of that offense to the suspect, and the judicially sanctioned imposition of restrictions on the suspect's liberty. Pet'r Br. at 20.[22] Rothgery here contends that the probable-cause determination is important only because it requires a magistrate to inform the accused of the charge against him, but nothing in Rothgery's theory can distinguish that judicial hearing in the defendant's presence from an ex parte judicial determination of probable cause preceding

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[22] See also Brief of Amici Curiae Twenty-Four Professors of Law at 21, n.5 ("It is the judicial determination of probable cause which is constitutionally required for significant pretrial restraints on liberty, that initiates adversary judicial proceedings, and which therefore causes the right to counsel to attach.").

issuance of an arrest warrant. Such a warrant, after all, must inform the arrestee of the offense he is believed to have committed. See Tex. Code Crim. Proc. art. 15.02(2). So Rothgery's relevant conditions exist at the moment a suspect is arrested on an arrest warrant that was issued by a judge. While this is not the argument Rothgery makes now, accepting his theory would guarantee that it soon would be advanced, with no logical reason to reject it.

D. Rothgery's Proposed Expansion of the Right to Counsel Would Create Significant Practical Problems for Law Enforcement and Local Government.

Rothgery's proposed expansion of the scope of the right to counsel would create very significant practical detriments for law enforcement and local government. Moreover, those detriments would far outweigh the benefits Rothgery contends would be realized by a small number of criminal defendants.

First, extending the right to counsel to any initial appearance before a magistrate will inspire significant amounts of vexatious litigation. Denial-of-counsel claims will proliferate on direct appeal, raising thorny issues about whether the absence of appointed counsel during a period of inactivity prior to the filing of a case should be considered harmless error. See, *e.g.*, *Coleman*, 399 U.S., at 11. More troubling, Rothgery's proposed extension of the right to counsel would invite the filing of federal habeas corpus claims by any unindicted suspect in custody, demanding a lawyer to prevent the filing of formal charges. In particular, if misdemeanor charges are a possibility, those claims conflict with *Scott* v. *Illinois*, because no right to counsel arises vis-à-vis those

charges unless imprisonment is imposed. 440 U.S., at 369. Rothgery's extension will also create the prospect of numerous tendentious claims for damages under §1983 from suspects like Rothgery, who connect their lack of appointed counsel to unspecified damages stemming from their detention, even though they could point to no prejudice sufficient to provide them with a right to relief under the Fourth Amendment or the Sixth Amendment's right to a speedy trial. Until now, the Court has never recognized any such §1983 claim for damages based on an untimely appointment of counsel.

Adopting Rothgery's theory will also work serious practical harms on law-enforcement efforts to investigate and prevent crimes. Any extension of the right to counsel into new contexts undeniably hampers police investigations. "In seeking evidence pertaining to pending charges, . . . the Government's investigative powers are limited by the Sixth Amendment rights of the accused." *Maine* v. *Moulton*, 474 U.S. 159, 179-180 (1985). Every expansion of the right to counsel eliminates additional scenarios under which police can question, record, speak with, or even just overhear a suspect without inadvertently violating his constitutional rights and jeopardizing a future prosecution. *E.g.*, *Fellers* v. *United States*, 540 U.S. 519, 524-525 (2004); *Moulton*, 474 U.S., at 176-177 & 177, n.14.

In addition, providing counsel to every indigent defendant at his initial appearance will multiply administrative complexity. Magistration is often an informal, bureaucratic step in processing arrestees, as it was in Rothgery's case. See SJ Opp. Ex. 3 at 62, 64 ("[W]hen they were taking my pictures and everything, I turned around to a little glass window

and talked to a magistrate"; "I spoke to him through the window, and that's when I filled all the paperwork out."). The presence of counsel would add little but inefficiency to such a process, even to the extent of potentially forcing the prosecutor to be on hand for all probable-cause determinations to argue any challenges offered by appointed counsel, even though such a determination is not constitutionally required to be adversarial. See *Gerstein*, 420 U.S., at 119-120; see also *Ash*, 413 U.S., at 317 (rejecting constructions of the right to counsel that "produce confrontation at an event that was not previously analogous to an adversary trial").

Finally, an extension of the right to counsel would impose substantial costs on local governments responsible for appointing counsel. And the additional costs of providing each indigent defendant "with a preindictment private investigator," *Gouveia*, 467 U.S., at 191, would be substantial. Incurring these expenses to protect the handful of indigent defendants who can conclusively prove their factual or legal innocence before indictment from a pretrial detention period fully justified under the Fourth Amendment would be a short-sighted and inefficient use of limited governmental resources. Such suspects can properly invoke other constitutional and statutory protections of their liberty; there is no basis "to wrench the Sixth Amendment from its proper context" of protecting defendants' right to a fair trial. *Marion*, 404 U.S., at 322.

Neither the practical nor the doctrinal consequences of Rothgery's proposed alteration of the right to counsel can be justified by the concerns for fairness and balance in the criminal justice system that have traditionally driven Sixth Amendment

analysis. And the impact of this change would be significant, broadly felt, and, on balance, damaging both to governmental institutions charged with enforcing the laws and society's interest in solving and preventing crimes. Accordingly, this Court should reject the extension Rothgery proposes, and retain the line drawn by its well-considered precedents.

CONCLUSION

For these reasons, the Court should affirm the judgment of the Fifth Circuit.

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No. 07-440

FILED
MAR 10 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

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v.

GILLESPIE COUNTY, TEXAS,
Respondent.

ON WRIT OF CERTIORARI TO THE
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Dix, George E. & Dawson, Robert O., *Texas Practice: Criminal Practice and Procedure* (2d ed. 2001) 18

Grano, Joseph D., *Rhode Island v. Innis: A Need to Reconsider the Constitutional Premises Underlying the Law of Confessions*, 17 Am. Crim. L. Rev. 1 (1979) 11, 15, 19

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IN THE

Supreme Court of the United States

No. 07-440

WALTER ALLEN ROTHGERY,

Petitioner,

v.

GILLESPIE COUNTY, TEXAS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR PETITIONER

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence." Petitioner Walter Rothgery was arrested for unlawful possession of a firearm by a felon—an offense of which he was innocent. Rothgery was brought before a magistrate, who informed him that he was accused of that offense and required him to post bond or remain in jail to ensure he answered the accusation. Rothgery knew he was innocent, but did not know how to prove it. He therefore requested counsel. His requests were ignored. Instead, he was indicted and jailed for three weeks before his belatedly appointed lawyer obtained his release and the dismissal of the false charge. The

Fifth Circuit nevertheless held that because no prosecutor was involved in Rothgery's arrest or magistration, a "criminal prosecution[]" had not commenced, and Rothgery was not an "accused" whose right to counsel attached, until indictment.

This case presents a single, narrow question: whether that holding is correct. It is not. This Court has repeatedly held that a criminal prosecution commences as soon as judicial criminal proceedings begin, even if that occurs before indictment. And the Court has specifically held that an initial appearance before a magistrate like that here, at which the defendant is informed of the accusation against him and committed to jail or bail, begins a criminal prosecution. Respondent's attempts to distinguish those decisions are nothing more than an ill-disguised plea to disregard them.

Even had this Court not already answered the question presented, the text and purpose of the Counsel Clause dictate the same outcome. Once a defendant appears before a judge who informs him of the charge against him and restricts his liberty to guarantee he answers that charge, he is "accused," and his right to counsel to defend against that accusation attaches. That is a question of federal constitutional law, whose answer is the same no matter how state law defines a "prosecution"—although application of Texas law would yield the same conclusion.

Perhaps recognizing the weakness of its arguments on the question presented, respondent focuses on a question not raised or considered below, contending that even if adversary judicial proceedings commenced at his magistration, Rothgery was not entitled to counsel because no "critical stage" of the prosecution occurred before his indictment. As this Court has made

clear, however, that question is distinct from, and logically subsequent to, the question presented: whether adversary judicial proceedings commenced upon Rothgery's magistration. Respondent's alternative argument is thus not properly presented, and this Court should not consider it. This Court addresses arguments not raised below and outside the question presented only in extraordinary circumstances. Respondent points to none here.

Respondent's new argument fails in any event. Respondent contends that the right to counsel ensures defendants only a "fair trial," and that because the charge against Rothgery was dismissed before trial (but after he had spent several months burdened with a pending false charge, including three weeks in jail), he suffered no harm against which the Sixth Amendment protects. But the right to counsel also assists defendants in combating "an erroneous or improper prosecution" prior to trial. *Coleman* v. *Alabama*, 399 U.S. 1, 9 (1970). Here, Rothgery had a right to an examining trial, which respondent concedes is a "critical stage" because it enables a defendant to contest improper charges *before* he is indicted and tried. As this Court has recognized, a defendant is entitled to counsel's assistance not only in preparing for and conducting such proceedings, but also in deciding whether to undergo them. Even if respondent were correct that appointment of counsel is required only for "critical stages," therefore, Rothgery was entitled to counsel's help in making an informed decision whether and how to invoke his right to an examining trial.

Ultimately, respondent's contention that a person who has been brought before a judge and informed of the accusation against him, has been required to post

bail, and has acquired the right to contest that accusation in court nevertheless is not "accused," and has no right to or need for counsel, cannot be reconciled with this Court's precedent. Nor can it be squared with the fundamental purposes of the Sixth Amendment, which include providing a defendant with counsel's help to "establish his innocence" and ensure that he is not "put on trial without a proper charge." *Powell* v. *Alabama*, 287 U.S. 45, 69 (1932).

ARGUMENT

I. RESPONDENT'S ARGUMENT DISTORTS THE QUESTION PRESENTED AND THIS COURT'S PRECEDENT

Respondent misapprehends both the question presented and the settled doctrine governing its resolution.

The sole question decided by the Fifth Circuit, and presented here, is whether a "criminal prosecution[]" commenced, and Rothgery became an "accused," upon his magistration. This Court has consistently held that a criminal prosecution commences upon the initiation of "adversary judicial proceedings" (or the synonymous "judicial criminal proceedings"). *Kirby* v. *Illinois*, 406 U.S. 682, 688-689 (1972) (plurality). At that point, "a person who had previously been just a 'suspect' has become an 'accused,'" *Michigan* v. *Jackson*, 475 U.S. 625, 632 (1986), and "the explicit guarantees of the Sixth Amendment are applicable," *Kirby*, 406 U.S. at 690.

Separately, this Court has held that once a prosecution commences, an accused is entitled to be represented by counsel at all "critical stages" of the prosecution, including pretrial proceedings at which he "require[s] aid in coping with legal problems or assistance in meeting his adversary." *United States* v. *Ash*, 413

U.S. 300, 313-314 (1973). The purpose of the critical-stage inquiry is not to determine the point at which a criminal prosecution begins and the protections of the Sixth Amendment first take effect, but to identify specific proceedings thereafter for which the accused is entitled to the assistance of counsel and which cannot, without a valid waiver, be conducted in counsel's absence. *Moore* v. *Illinois*, 434 U.S. 220, 224-225 (1977); *United States* v. *Wade*, 388 U.S. 218, 226-227 (1967). The critical-stage test thus asks whether a proceeding threatens "potential substantial prejudice" to the defendant's rights that counsel's assistance could help avoid. *Wade*, 388 U.S. at 227; *Coleman*, 399 U.S. at 7.

The question whether judicial criminal proceedings have begun, and a prosecution has commenced, is thus distinct from the question whether a particular proceeding is a "critical stage." The former question is logically antecedent to the latter: if no prosecution has begun, a proceeding cannot be a "critical stage" of a prosecution—even if counsel's assistance could prevent prejudice to the defendant. *Kirby*, 406 U.S. at 689-690; *Moran* v. *Burbine*, 475 U.S. 412, 428-429 (1986). Moreover, a judicial proceeding need not itself be a "critical stage" to mark the commencement of a prosecution. "The question whether [a proceeding] signals the initiation of adversary judicial proceedings ... is distinct from the question whether [the proceeding] itself is a critical stage requiring the presence of counsel[.]" *Jackson*, 475 U.S. at 629 n.3.

Respondent conflates these two distinct inquiries throughout its brief. This case presents only the question whether judicial criminal proceedings began upon Rothgery's magistration. Rothgery has never contended that the magistration itself was a "critical

stage" at which he was entitled to counsel's presence. Yet much of respondent's brief (*e.g.*, Br. 1, 26-27, 40-41) addresses this irrelevant issue. Similarly, in disputing that a prosecution commenced at Rothgery's magistration, respondent makes arguments relevant only to the critical-stage analysis, contending (Br. 1-3, 10-11, 16-17, 26-30, 40-42) that the magistration was not "adversarial" and could not prejudice Rothgery's right to a fair trial.

Much of respondent's confusion stems from its misapprehension of *Kirby* and its progeny. Respondent interprets *Kirby* to establish a "general rule" that a felony prosecution commences only upon "formal charges" (Br. 10, 14)—which respondent equates with indictment or information—with exceptions for a "very limited set of specific preindictment situations" (Br. 23) when a critical stage occurs or a prosecutor's involvement signals the government's commitment to prosecute. Nothing in this Court's precedent, however, supports this tortured reading of *Kirby*—which asks simply whether "judicial criminal proceedings" have begun. 406 U.S. at 689.

First, there is no support in *Kirby* or elsewhere for respondent's "general rule" that judicial criminal proceedings commence only upon indictment. Indeed, *Moore* expressly rejected that rule, recognizing that it "cannot be squared with *Kirby*," which itself stated that a felony prosecution can begin before indictment. 434 U.S. at 228; *see Kirby*, 406 U.S. at 689. *Brewer* and *Jackson* likewise held that adversary judicial proceedings commenced upon pre-indictment initial arraignments before magistrates. *Brewer* v. *Williams*, 430 U.S. 387, 398-399 (1977); *Jackson*, 475 U.S. at 629. And in *McNeil* v. *Wisconsin*, it was undisputed that adver-

sary judicial proceedings commenced upon the defendant's initial appearance before a county court commissioner who scheduled a preliminary examination and set bail. 501 U.S. 171, 173, 175 (1991). As *McNeil* explained, the right to counsel "attaches at the first formal proceeding against an accused." *Id.* at 180-181.

Second, just as there is no "general rule" that prosecutions commence only upon indictment, there is no exception to that rule for pre-indictment "critical stages." Respondent is forced to posit such an exception to account for *Coleman*, which held that the right to counsel attached at a pre-indictment preliminary hearing. 399 U.S. at 8-10. But *Kirby* does not treat *Coleman* as an exception to any "general rule," instead citing *Coleman* as one of a line of cases that "established that [the] right to counsel attaches only at or after the time that adversary judicial proceedings have been initiated." 406 U.S. at 688-689. Nor was it relevant to *Kirby*'s analysis that *Coleman* involved a "critical stage." Far from holding that prosecutions can commence only by indictment or, in exceptional circumstances, through a pre-indictment "critical stage," *Kirby* establishes that a prosecution commences as soon as "judicial criminal proceedings" begin, however they begin.

Third, contrary to respondent, *Kirby* did not establish a "functional analysis" (Br. 22) under which pre-indictment judicial proceedings initiate a prosecution only when the facts of a particular case show that "the government has committed itself to prosecute," 406 U.S. at 689—which respondent apparently takes to mean that a prosecutor must be involved. Respondent's lengthy discursion (Br. 21-33) on whether that "functional analysis" is satisfied here thus asks and an-

swers the wrong question. *Kirby* did not hold that courts should examine the government's "commitment to prosecute" in a particular case to determine whether adversary judicial proceedings had begun. Rather, it held that the right to counsel attaches upon the "initiation of judicial criminal proceedings" *because* such proceedings evidence a commitment to prosecute and demonstrate that the government and defendant are now adversaries. 406 U.S. at 689; *see* Pet. Br. 35-38. This Court has consistently adhered to that rule. *McNeil*, 501 U.S. at 180-181 (right to counsel attaches at "first formal proceeding against an accused"); *Jackson*, 475 U.S. at 629 n.3 ("initiation of formal legal proceedings"); *Brewer*, 430 U.S. at 398 ("judicial proceedings").

Far from being a "mere formalism," *Kirby*, 406 U.S. at 689, this rule makes sense: when a person is brought before a judicial officer who formally apprises him of the government's accusation and restricts his liberty to ensure he answers that accusation, that person is an "accused," with the State as his adversary. It makes no difference to the defendant whether a prosecutor is involved; once judicial proceedings have commenced, the accused faces "the prosecutorial forces of organized society" and must negotiate the "intricacies of substantive and procedural criminal law" to contest the charge against him. *Id.* At that point, a "criminal prosecution[]" has begun, and the Sixth Amendment right to counsel attaches.

II. ROTHGERY'S MAGISTRATION MARKED THE COMMENCEMENT OF ADVERSARY JUDICIAL PROCEEDINGS

A. *Brewer* And *Jackson* Control This Case

In *Brewer* and *Jackson*, this Court applied *Kirby*'s test to circumstances substantively identical to those here, holding that a defendant's initial appearance before a magistrate, who informed him of the accusation against him and committed him to custody, marked the commencement of adversary judicial proceedings. *Brewer*, 430 U.S. at 399; *Jackson*, 475 U.S. at 629. Those holdings control here. Respondent's only answer is to disparage *Brewer* and *Jackson* as lacking "careful consideration" (Br. 32 n.13), and to distinguish them based on purported facts that appear neither in the decisions nor in the record, but are simply respondent's invention. Ultimately, respondent's argument reduces to a thinly-veiled plea to overrule those decisions.

Respondent first contends (Br. 33) that *Brewer*'s discussion of the attachment issue is dicta. That is incorrect. Although the issue was undisputed, the Court expressly addressed it, concluding that "[t]here can be no doubt ... that judicial proceedings [were] initiated" when Williams was arrested, "arraigned on [the arrest] warrant" before a magistrate, and "committed by the court to confinement." 430 U.S. at 399. That conclusion was necessary to the Court's holding that Williams' right to counsel was violated by his post-arraignment interrogation: had adversary judicial proceedings not commenced, there would have been no violation. *Id.* at 398-399.

Nor is it true that *Brewer* and *Jackson* "neither provide[d] nor appl[ied] an analytical framework for determining attachment," in "stark[] contrast[]" to "*Kirby*'s careful consideration" (Resp. Br. 32 n.13). In

his opinion for the Court in *Brewer*, Justice Stewart—who also authored *Kirby*—expressly applied *Kirby*'s analytical framework, holding that "[t]here [could] be no doubt" that it was satisfied on *Brewer*'s facts. 430 U.S. at 398-399. In *Jackson*, this Court similarly applied the *Kirby* test and found it easily met. 475 U.S. at 629 & n.3.

Respondent next contends that because *Brewer* stated that Williams was "arraigned," the proceeding must have differed from Rothgery's magistration. While acknowledging that nothing in the decision or record suggests that an indictment or information was filed before the arraignment *Brewer* describes, and that Williams was actually indicted several weeks *after* that arraignment, *State* v. *Williams*, 182 N.W.2d 396, 398-399 (Iowa 1970), respondent speculates (Br. 34-35) that "[b]ecause Williams was 'arraigned,' the Court would likely have ... assumed" that the proceeding entailed entry of a plea to an information.

That argument is mere sleight-of-hand with nomenclature. As we previously explained (Pet. Br. 20-21 & n.7), the term "arraignment" has two meanings. It can mean a defendant's appearance to enter a plea to an indictment or information. Or it can mean a defendant's initial appearance before a magistrate, at which he is informed of the charges against him—in which case it may be called an "arraignment on the warrant," an "arraignment on the complaint," or a "preliminary arraignment" (or, in Texas, "magistration" or an "Article 15.17 hearing"). LaFave, 1 *Criminal Procedure* §1.3(k) (2d ed. 1999).[1] *Brewer* noted that Williams was

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[1] In both Iowa and Texas—as in other jurisdictions—"arraignment" can carry either meaning. *State* v. *Tharp*, 138

"arraigned on [a] warrant," 430 U.S. at 399, indicating that the proceeding was a preliminary arraignment before a magistrate. *Brewer* has consistently been so understood. *See, e.g.*, Grano, *Rhode Island v. Innis*, 17 Am. Crim. L. Rev. 1, 30 (1979) ("[I]n [*Brewer*], Justice Stewart had no difficulty finding that adversary judicial proceedings had commenced with the preliminary arraignment."); Pet. Br. 24-26 & n.10.

Respondent's speculation that Williams entered a plea to an information at his "arraign[ment] on [the] warrant" is thus baseless. The record makes clear that Williams' "arraignment" took place in municipal court, *see* Appendix, *Brewer* v. *Williams*, No. 74-1263, at 106, and only later, following indictment, did he plead not guilty and stand trial in the district court, *Williams*, 182 N.W.2d at 398. A felony information could have been filed only in district court—not municipal court—and Iowa procedure did not provide for a plea until that stage. *State* v. *Jacobs*, 100 N.W.2d 601, 602-603 (Iowa 1960); Iowa Code §§769.2, 769.13, 775.1, 775.8 (1966) (repealed 1976). In short, all the evidence is that Williams' "arraign[ment] on [the] warrant" was substantively identical to Rothgery's magistration.

Respondent's efforts to distinguish *Jackson* likewise fail. Citing Michigan's brief in *Bladel* (the case consolidated with *Jackson*), respondent argues (Br. 37) that "the court entered a plea of not guilty on behalf of the defendant," while no plea was entered at Rothgery's appearance. But that contention is misleading: as Michigan's brief emphasized, the arraigning court—

N.W.2d 78, 79-80 (Iowa 1965); *Upton* v. *State*, 853 S.W.2d 548, 554-555 (Tex. Crim. App. 1993).

like the magistrate here—"ha[d] no jurisdiction to accept a plea of guilty to a felony charge" or "render a final decision in a felony case." Pet. Br., No. 84-1539, 1985 WL 669876, at *25.[2] The proceeding there, as here, was an initial arraignment before a magistrate who informs the defendant of the charge and his rights and sets bond—not an arraignment on an indictment or information, which could occur only in the general trial court with jurisdiction to enter final judgment in a felony case. *Id.* The State therefore argued that the initial arraignment could not initiate adversary judicial proceedings—precisely the same argument respondent makes here. This Court considered and rejected that argument as "untenable," holding that the initial arraignment "signal[ed] ... the attachment of the Sixth Amendment." *Jackson*, 475 U.S. at 629 & n.3. That holding governs here.

B. Rothgery Was Charged At His Magistration, Which Commenced A Criminal Prosecution Under The Sixth Amendment

Just as in *Brewer* and *Jackson*, Rothgery was informed at his magistration that he was accused of a felony and committed to custody (pending posting of bond) to ensure he answered that accusation. Respondent nevertheless argues that Rothgery's Sixth Amendment rights had not attached because, under

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[2] Respondent also notes (Br. 36) that the *Jackson* defendants could have made a statement, but Rothgery could also have done so. Tex. Code Crim. Proc. art. 15.17 (magistrate must inform accused that "he is not required to make a statement and that any statement made by him may be used against him"). The magistrate in *Bladel* similarly advised the defendant to "stand mute." Pet. Br., No. 84-1539, at *4.

Texas law, there can be no felony "charge" or "prosecution" until a prosecutor files an indictment or information. That contention is meritless. *First*, whether a "criminal prosecution[]" exists under the Sixth Amendment is a question of federal law, answered by examining the substance of the proceedings against the defendant, not the label state law attaches to them. *Second*, even if Texas law did control, it would not support respondent's conclusion.

1. The question whether a "criminal prosecution[]" has begun, and a suspect has become an "accused," under the Sixth Amendment is one of federal law. *See Moran*, 475 U.S. at 429 n.3 ("[T]he type of circumstances that would give rise to the right [to counsel] would certainly have a federal definition."). Although, in answering that question, courts must examine state procedures and their consequences for the defendant, the labels state law gives those procedures cannot control. "[W]hat is most important is what the state does and the operative effects of its action and not what the state says about when a prosecution begins." *United States ex rel. Burton* v. *Cuyler*, 439 F. Supp. 1173, 1180 n.10 (E.D. Pa. 1977) (Becker, J.).[3]

The Court has employed this approach in a variety of analogous circumstances. For example, in determin-

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[3] *Moore* is not to the contrary. There, although the Court noted that a prosecution "commenced under Illinois law when the victim's complaint was filed in court," that did not end the analysis; the Court went on to examine the objective nature and consequences of the subsequent judicial proceedings against the defendant before concluding that adversary judicial proceedings had begun. 434 U.S. at 228. It did not rely on Illinois law for that ultimate Sixth Amendment conclusion.

ing when the Sixth Amendment's jury-trial guarantee applies, the "dispositive question ... 'is one not of form, but of effect.' If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt." *Ring* v. *Arizona*, 536 U.S. 584, 602 (2002). The jury-trial right thus does not turn on whether state law calls the relevant facts "elements of the offense, sentencing factors, or Mary Jane." *Id.* at 610 (Scalia, J., concurring). Similarly, in the double-jeopardy context, a State's characterization of a judge's not-guilty finding "as a legal rather than factual determination is ... 'not binding.'" *Smith* v. *Massachusetts*, 543 U.S. 462, 468-469 (2005). Rather, what matters is what the judge actually did—*i.e.*, whether the judge "evaluated the ... evidence and determined that it was legally insufficient to sustain a conviction." *Id.* at 469.

Applying that approach here, Rothgery's appearance before the magistrate rendered him an "accused," and commenced a "criminal prosecution[]." At that appearance, the magistrate was presented with a sworn affidavit by the arresting officer "charg[ing]" Rothgery, "in the name and by the authority of the State of Texas," with a felony. Pet. App. 33a. As required by statute, the magistrate informed Rothgery that he was "accused of the criminal offense of unlawful possession of a firearm." *Id.* 35a. And the magistrate required Rothgery to post bail to ensure he answered that accusation. *Id.*; Tex. Code Crim. Proc. ("TCCP") art. 17.01 ("'Bail' is the security given by the accused that he will appear and answer before the proper court the accusation brought against him[.]"). Rothgery's bail bond—which was required by statute to indicate whether he was "charged" with a felony or misdemeanor, *id.* art.

17.08(3)—stated that he "stands charged by complaint duly filed in the Justice of Peace Court" with a felony. Pet. App. 39a. Moreover, upon his magistration, Rothgery—as the "accused in [a] felony case"—acquired the right to an examining trial, in which the magistrate must "examine into the truth of the accusation made" and discharge the defendant absent probable cause for the accusation. TCCP arts. 16.01, 16.17.[4]

Respondent's notion (Br. 11) that "[t]here was no case" and "no charge" against Rothgery following his magistration blinks reality. Had there been no case and no charge, there would have been no reason to inform him that he was accused of a felony, to require him to post bail to ensure he would "answer ... the accusation," or to grant him the right to contest the accusation through an examining trial. Just as in *Brewer* and *Jackson*, and for the same reasons, Rothgery's magistration marked the commencement of adversary judicial proceedings and of a criminal prosecution. Indeed, "it would defy common sense to say that a criminal prosecution has not commenced against a defendant who, perhaps incarcerated and unable to afford judicially imposed bail, awaits preliminary examination on the authority of a charging document filed by the prosecutor, less typically by the police, and approved by a court of law." Grano, *supra*, at 31; *see Armstrong* v. *Squadrito*, 152 F.3d 564, 572 (7th Cir. 1998) (across jurisdictions, "the first appearance" before a magis-

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[4] The Code further demonstrates that a prosecution exists once a defendant is magistrated and committed to jail or bail by providing that an information or indictment must be filed within a set period or "the prosecution" shall be "dismissed" absent good cause. TCCP art. 32.01; *see id.* art. 15.14.

trate, who informs "the defendant [of] the charges" against him, "marks the formal beginning of [a] criminal prosecution"). Respondent's view that nothing of significance was happening to Rothgery at this point and "there was no defense to prepare" (Br. 3) would come as quite a surprise to any ordinary citizen in Rothgery's shoes, and simply evidences respondent's refusal to engage with "realities, not nomenclature." *Senior* v. *Braden*, 295 U.S. 422, 429 (1935).[5]

2. Against this common-sense conclusion, respondent's primary argument (Br. 19-21) is that Texas law requires felony prosecutions to proceed by indictment or information. Even if Texas law controlled the analysis of the federal constitutional question, however, it would not aid respondent.

Felony prosecutions in Texas, as is common throughout the country, typically have two phases. A preliminary charging document (generally called a "complaint") is filed with a magistrate, who has jurisdiction over the charges, and any examining trial held to contest them, until an indictment or information is filed, when jurisdiction transfers to the district court. *Ex parte Clear*, 573 S.W.2d 224, 229 (Tex. Crim. App. 1978).[6] As respondent's own authority indicates, "the

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[5] Similarly, respondent repeatedly emphasizes (Br. 5, 26) that the magistration took place at a "little glass window." The magistration, however, was a statutorily prescribed proceeding that formally apprised Rothgery of the accusation against him. Its constitutional significance cannot turn on the trappings of the room where it was held.

[6] This explains why Rothgery's warning form stated: "You are accused of the criminal offense of: unlawful possession of a firearm ... which will be filed in ... District Court." Pet. App. 35a.

process of prosecution" thus can begin prior to indictment, with proceedings before a magistrate. *State* v. *Boseman*, 830 S.W.2d 588, 591 (Tex. Crim. App. 1992).[7]

The Texas Court of Criminal Appeals has recognized that felony prosecutions can commence for Sixth Amendment purposes upon pre-indictment proceedings before a magistrate, including an Article 15.17 appearance or the filing of a complaint. *Clark* v. *State*, 627 S.W.2d 693, 697 (1981); *Barnhill* v. *State*, 657 S.W.2d 131, 132 (1983); *Nehman* v. *State*, 721 S.W.2d 319, 321-323 (1986); *Fuller* v. *State*, 829 S.W.2d 191, 205 (1992); *Upton* v. *State*, 853 S.W.2d 548, 555 (1993). In *Green* v. *State*, 872 S.W.2d 717 (1994), the Court of Criminal Appeals declined to decide whether the Article 15.17 appearance in that case initiated adversary judicial proceedings, but noted that *Barnhill* and *Nehman* were "consistent with, if not dictated by, precedent from the United States Supreme Court." *Id.* at 720. Since *Green*, Texas intermediate appellate courts have continued to find that adversary judicial proceedings can commence before indictment, with a complaint or Article 15.17 appearance before a magistrate. *Terrell* v.

At magistration, the charge against Rothgery was pending before the magistrate; upon indictment, jurisdiction transferred to the district court.

[7] Like Texas, many States require indictment or information for a felony conviction. This Court has nevertheless found adversary judicial proceedings to commence before indictment or information in cases from such States. *Compare* Ala. Const. art. I, §8, *with Coleman*, 399 U.S. at 8-9; Iowa Code §769.1 (1966) (repealed 1976) *with Brewer*, 430 U.S. at 399; Ill. Comp. Stat. 38/111-2(a) (1967) *with Moore*, 434 U.S. at 228; Mich. Ct. R. 6.112(B) *with Jackson*, 475 U.S. at 629; Wis. Stat. §967.05 *with McNeil*, 501 U.S. at 173, 175.

State, 891 S.W.2d 307, 312 (Tex. App. 1994); *Neumuller* v. *State*, 953 S.W.2d 502, 512-514 (Tex. App. 1997); *Lemmons* v. *State*, 75 S.W.3d 513, 520 (Tex. App. 2002); *Arabzadegan* v. *State*, 240 S.W.3d 44, 48 (Tex App. 2007).[8] The leading treatise on Texas criminal procedure similarly recognizes that, under *Jackson*, "a defendant has a Sixth Amendment right to counsel ... after the defendant has been presented before a magistrate for article 15.17 purposes." Dix & Dawson, 41 *Texas Practice* §14.22 (2d ed. 2001).

Respondent also argues (Br. 24) that a prosecution could not have commenced at Rothgery's magistration under Texas law because no prosecutor was involved. But respondent cites no authority for that claim other than the unremarkable proposition that prosecutors represent the State in all criminal cases and retain ultimate discretion over whether to prosecute. That

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[8] Here, the officer's sworn affidavit "charg[ing]" Rothgery with a felony (Pet. App. 33a) served the function of a complaint. TCCP art. 15.04 ("The affidavit made before the magistrate ... is called a 'complaint' if it charges the commission of an offense."); *id.* art. 15.05 (complaint "shall be sufficient, without regard to form" if it states accused's name, shows he has committed an offense, states time and place of offense, and is signed by affiant). Although, as the Fifth Circuit observed (Pet. App. 11a n.14), these articles appear in a chapter entitled "Arrest Under Warrant," nothing limits their applicability to affidavits filed to obtain warrants. *Cf.* Tex. Gov't Code §311.024 (chapter headings do "not limit or expand the meaning of a statute"). The Texas Attorney General has recognized that an officer's affidavit following a warrantless arrest can be viewed as the functional equivalent of other "complaints" in felony cases, "all [of which] share a basic characteristic: they set forth the basis of the criminal charges against the accused." Tex. Atty. Gen. Op. LO-98-066, 1998 WL 537341, at *2-3 (Aug. 19, 1998).

proposition, however, is not inconsistent with the common-sense principle that a prosecution has been commenced when a defendant "awaits preliminary examination on the authority of a charging document filed by the prosecutor [or] by the police, and approved by a court of law." Grano, *supra*, at 31. Police in Texas can and do initiate criminal proceedings by filing such preliminary charging documents. *Clark*, 627 S.W.2d at 694, 697; *Felder* v. *McCotter*, 765 F.2d 1245, 1246-1248 (5th Cir. 1985); *supra* note 8. And, as a matter of Texas law, following magistration in a felony case, the defendant has become an "accused" with a statutory right to contest that accusation through an examining trial, whether or not a prosecutor was involved. TCCP art. 16.01.

Whether a defendant's initial court appearance is instigated by a prosecutor or by the police alone, its consequences for the defendant are the same: he has been formally accused of a crime, his liberty may be restrained, and he must negotiate the "intricacies of substantive and procedural criminal law," *Kirby*, 406 U.S. at 689, to defend against the charges. In either event, such a proceeding initiates a "criminal prosecution[]" under the Sixth Amendment.

C. Respondent's Parade Of Horribles Is Baseless

Respondent contends that holding that adversary judicial proceedings commenced upon Rothgery's magistration would implicitly overrule several of this Court's precedents and hamper law enforcement nationwide. That hyperbole has no basis in law or fact.

Rothgery's position does not call into question, still less "directly contradict[]" (Resp. Br. 46), any aspect of *Gerstein* v. *Pugh*, 420 U.S. 103 (1975). Nor, contrary to respondent (Br. 52), would accepting Rothgery's argu-

ment logically require the presence of counsel at bail hearings. Rothgery does not contend here that he was entitled to counsel's presence for the *Gerstein* determination that was combined with his magistration or for any aspect of the magistration itself, including the setting of bail. Nor does Rothgery argue that the deprivation of liberty, without more, necessarily constitutes the initiation of adversary judicial proceedings. Rather, he argues that his magistration initiated adversary judicial proceedings because, following it, he stood accused by the State of a crime—as evidenced in part by the requirement that he post bail to ensure he answered that accusation.

Similarly, Rothgery does not contend that the right to counsel attaches upon arrest (Resp. Br. 52), even if preceded by a judicial probable-cause determination, but upon the "initiation of judicial criminal proceedings," *Kirby*, 406 U.S. at 689. This Court has consistently recognized that the first judicial proceeding marks the attachment of the right to counsel. Whatever significance a mere arrest on a warrant may have—a question not presented here—this Court's cases make clear that "at least from the time defendant is brought into court and arraigned on the warrant (at which point it or the complaint underlying it becomes a tentative charging document) the Sixth Amendment right to counsel applies." 2 LaFave, *supra*, §6.4(e).

Respondent also wrongly claims (Br. 11-12, 46-47, 55) that Rothgery's position would require counsel at lineups and interrogations before a prosecution begins, and would grant suspects a right to pre-charge private investigators—thus contravening *Kirby* and *United States* v. *Gouveia*, 467 U.S. 180 (1984), and reinvigorating "the Sixth Amendment reading" of *Escobedo* v. *Il-*

linois, 378 U.S. 478 (1964). Respondent here merely assumes its own conclusion that adversary judicial proceedings do not commence until indictment. Rothgery argues that his magistration marked the initiation of adversary judicial proceedings, not that his right to counsel attached, or would apply at a lineup or interrogation, before the initiation of such proceedings. And, rather than a private investigator, Rothgery sought an attorney who could demonstrate that the charges against him were invalid.

Nor does Rothgery's position conflict with *Scott* v. *Illinois*, 440 U.S. 367 (1979) (Resp. Br. 46). *Scott* holds that a defendant charged with a misdemeanor is entitled to counsel only if he is sentenced to imprisonment. Rothgery, however, was charged with a felony at his magistration, and *Scott* therefore has no application. *Nichols* v. *United States*, 511 U.S. 738, 743 n.9 (1994). Moreover, the purported problem respondent identifies—that a prosecutor may reduce felony charges to misdemeanor charges, thus implicating *Scott*—exists both before and after indictment, and cannot support a rule that the right to counsel attaches only on indictment.

Finally, reaffirming that an initial appearance commences a prosecution would not work a sea-change in criminal procedure, create "significant" problems for law enforcement, or impose "substantial" costs on local government (Resp. Br. 53-56). At least 45 jurisdictions, including the federal government, currently appoint counsel at or promptly after the initial appearance and experience no apparent difficulty (NACDL Br. 12-16, 1a-7a)—a fact uncontested by respondent or its State amici.

Rather, it is the Fifth Circuit's rule that, by requiring a burdensome, intrusive, and often "elusive" (Pet. App. 6a) inquiry into the extent of prosecutorial involvement in a particular case, would present insurmountable practical problems. Respondent fails to dispute the many disadvantages of that approach catalogued in the opening brief. This Court should reject it and reaffirm that a "criminal prosecution[]" begins at the first judicial proceeding against an accused.

III. The Critical-Stage Doctrine Provides No Basis For Affirmance

A. Respondent's Critical-Stage Argument Is Not Properly Before The Court

Unable to prevail on the question presented, respondent resorts to an alternative argument—that even had adversary judicial proceedings commenced, Rothgery was not entitled to counsel because no "critical stage" occurred between his magistration and indictment. This argument was not raised or considered below, is outside the question presented, and is not properly before this Court.

The Fifth Circuit expressly noted that respondent made no critical-stage argument, and the court therefore refused to address the issue. Pet. App. 5a n.5 ("Gillespie County does not argue that the time between Rothgery's release on bond and his indictment ... did not constitute a critical stage of the prosecution, and we do not decide that issue here."). Absent exceptional circumstances, this Court does not decide questions not raised or resolved below. *Travelers Cas. & Sur. Co.* v. *PG&E*, 127 S. Ct. 1199, 1207 (2007); *Glover* v. *United States*, 531 U.S. 198, 205 (2001). Respondent

articulates no justification for departing from that consistent practice here.

Moreover, respondent's critical-stage argument is outside the question presented: whether adversary judicial proceedings—and thus a "criminal prosecution[]"—commenced upon Rothgery's magistration. As discussed above, *see supra* Part I, that question is distinct from, and logically antecedent to, the question whether any "critical stages" of the prosecution occurred thereafter. *Jackson*, 475 U.S. at 629 n.3.

Respondent contends (Br. 37 n.15) that its critical-stage argument is fairly included within the question presented because this Court has "uniformly" addressed right-to-counsel questions "by deciding whether it was necessary to appoint counsel in the context of specific proceedings and events, not by deciding abstract questions about attachment." That contention is refuted by this Court's decisions rejecting right-to-counsel claims where the threshold requirement of attachment—*i.e.*, initiation of adversary judicial proceedings—was not met, even though the "specific proceedings and events" at issue would have required counsel's presence had the right attached. *See Moran*, 475 U.S. at 431-432; *Kirby*, 406 U.S. at 689-690.

Because there is no need to address respondent's critical-stage argument to resolve the question presented, it is not fairly included in that question. *See Yee* v. *City of Escondido*, 503 U.S. 519, 535-538 (1992) (alternative argument "related to" question presented was not fairly included therein because question presented could be resolved without reaching that argument). Accordingly, this Court should not consider it. S. Ct. R. 14.1(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by

the Court."); *Travelers*, 127 S. Ct. at 1207; *Yee*, 503 U.S. at 535.[9]

B. Respondent's Critical-Stage Argument Also Fails On The Merits

Were respondent's critical-stage argument properly before the Court, it would still provide no basis for affirmance.

As an initial matter, this Court has never held that once a prosecution commences and the "explicit guarantees of the Sixth Amendment" take effect, *Kirby*, 406 U.S. at 690, the right to counsel lies "dormant"—even while a defendant may spend months in jail or on bail due to pending criminal charges—until "activated" by an imminent "critical stage." Resp. Br. 11, 38-44. Indeed, the Court has repeatedly observed that "a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him" to assist in navigating the proceedings and preparing a defense. *Brewer*, 430 U.S. at 398; *Estelle* v. *Smith*, 451 U.S. 454, 469 (1981); *Maine* v. *Moulton*, 474 U.S. 159, 170 (1985); *see also Evitts* v. *Lucey*, 469 U.S. 387, 394 n.6 (1995) (noting that a defendant needs counsel not only "to meet the adversary presentation of the prosecutor," but to negotiate "a legal system governed

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[9] Nor did respondent argue in opposing certiorari that this Court should not reach the question presented because the judgment could be affirmed on this alternative ground. Respondent commented in passing in its statement of the case that while "Petitioner was out on bond, he did not experience any critical pretrial proceedings" (Opp. 4), but never cited that point as a reason for denying certiorari. For this reason, too, the Court should not consider this argument. S. Ct. R. 15.2; *Alabama* v. *Shelton*, 535 U.S. 654, 660 n.3 (2002).

by complex rules and procedures"); *Michigan* v. *Harvey*, 494 U.S. 344, 348 (1990) ("the essence" of the right to counsel "is the opportunity ... to consult with an attorney and have him investigate the case and prepare a defense for trial"); *Powell*, 287 U.S. at 57.

Even if indigent defendants are entitled to counsel's aid only to negotiate critical stages, however, Rothgery was entitled to counsel well before indictment. Following his magistration, Rothgery stood accused of a crime he had not committed. He repeatedly requested a lawyer because he knew he was innocent, but did not know how to prove it. Texas law provides a mechanism by which defendants in that situation can contest erroneous charges before indictment: as "the accused in [a] felony case," Rothgery was entitled to an examining trial to challenge the probable cause for the accusation. TCCP art. 16.01. If, after an evidentiary hearing, the magistrate finds no probable cause, the defendant is discharged. *Id.* art. 16.17. As this Court's precedent dictates, *see Coleman*, 399 U.S. at 9-10, and respondent concedes (Br. 27 n.9, 29 n.10), the examining trial is a critical stage at which Rothgery would have been entitled to counsel's assistance.

Rothgery's right to an examining trial, however, existed only before indictment, and only if Rothgery requested it. TCCP art. 16.01. Rothgery accordingly needed a lawyer prior to indictment to help him understand his right to an examining trial, assess its possible benefits and costs, and navigate the procedure for invoking it. As this Court has made clear, a defendant is entitled to consult with counsel prior to critical-stage proceedings, not only to prepare for such proceedings, but also to decide whether to undergo them. In *Estelle*, for example, the Court found a Sixth Amendment viola-

tion where a capital defendant underwent a pretrial psychiatric examination—a critical stage of the proceedings—without first having the opportunity to consult with counsel regarding "the significant decision of whether to submit to the examination." 451 U.S. at 471. "[A] defendant should not be forced to resolve such an important issue without 'the guiding hand of counsel.'" *Id.*

Here, the magistrate informed Rothgery that "[i]n felony cases, you have a right to an examining trial." Pet. App. 35a. But, without counsel, Rothgery could not have been expected to understand that right or make an informed decision whether to invoke it. As this Court has repeatedly recognized, the right to counsel is so vital because it "affects [a defendant's] ability to assert any other rights he may have." *United States* v. *Cronic*, 466 U.S. 648, 653 (1984). "[I]t is through counsel that all other rights of the accused are protected." *Penson* v. *Ohio*, 488 U.S. 75, 84 (1988). "Because a layman may not be aware of the precise scope, the nuances, and the boundaries" of his rights, the assertion of those rights "often depends upon legal advice from someone who is trained and skilled in the subject matter." *Estelle*, 451 U.S. at 471. Even under respondent's critical-stage theory, then, Rothgery was entitled to counsel well before indictment.

Respondent's contrary claim is rooted in the erroneous view that a defendant's right to counsel exists solely to protect his right to a "fair trial," defined narrowly as the "'right meaningfully to cross-examine the witnesses against him [or] to have effective assistance of counsel at the trial itself.'" Br. 41-42 (quoting *Wade*, 388 U.S. at 227). But while "the purpose of the [right to counsel] is to ensure a fair trial[,] ... it does not follow

that the right[] can be disregarded so long as the trial is, on the whole, fair." *United States* v. *Gonzalez-Lopez*, 126 S. Ct. 2557, 2562 (2006). As in *Gonzalez-Lopez*, by arguing that because Rothgery was not deprived of a fair trial, his right to counsel could not have been violated, respondent "abstracts from the right to its purposes, and then eliminates the right." *Id.*

Respondent is wrong to suggest that the right to counsel has no role in helping an accused prove his innocence, prior to trial, of false charges against him. To the contrary, the Court has recognized that counsel is "essential to protect the indigent accused against an erroneous or improper prosecution." *Coleman*, 399 U.S. at 9. Thus, even though the preliminary hearing in *Coleman* did not require the defendant to advance any defenses, and, if the defendant lacked counsel, nothing occurring at the hearing could be used against him at trial, the Court held that the preliminary hearing was a "critical stage," threatening "potential substantial prejudice" to the defendant's rights, in part because the assistance of counsel at that hearing could "expose fatal weaknesses in the State's case that [might] lead the magistrate to refuse to bind the accused over." *Id.* Here, just as in *Coleman*, counsel's assistance could have "expose[d] fatal weaknesses" in the case against Rothgery that would have terminated the prosecution prior to indictment and trial. Requiring appointment of counsel in these circumstances is thus fully consistent with, and indeed central to, the purposes of the Sixth Amendment.

Nor, contrary to respondent's contentions (Br. 47-51), does recognizing that right confuse the protections afforded by the Counsel Clause with those granted by the Fourth Amendment and Speedy Trial Clause. To

be sure, permitting defendants access to counsel to contest charges against them prior to trial may result in freeing innocent persons from pretrial detention. But it does not follow that, because the Fourth Amendment and Speedy Trial Clause impose wholly different limitations on the scope and duration of pretrial detention, the right to counsel plays no role in protecting a defendant's liberty by assisting him in contesting false charges. Nothing in *Gerstein* or *Gouveia* is to the contrary. Indeed, *Gerstein* expressly distinguished the situation here, in which counsel's assistance "could mean that [a defendant] would not be tried at all," from a *Gerstein* hearing in which "only ... pretrial custody" is at issue. 420 U.S. at 123. Similarly, while *Gouveia* stated that the right to counsel is not triggered by arrest alone, 467 U.S. at 190, it does not follow that the right is irrelevant to "protecting the liberty interests of the accused" (Resp. Br. 49). On the contrary, that is the fundamental purpose of the right to counsel, accomplished by providing the accused in a criminal prosecution with counsel's assistance in contesting the accusation against him.

Ultimately, respondent's constricted vision of the right to counsel cannot be reconciled either with the Sixth Amendment's text—under which the right "is triggered when and because a person is 'accused' of 'criminal' wrongdoing"—or with its ultimate purpose: to act as an "engine[] by which an innocent man can make the truth of his innocence visible." Amar, *Sixth Amendment First Principles*, 84 Geo. L.J. 641, 643, 705 (1996). The right to counsel serves not only to protect a defendant at trial itself, but to assist him in determining whether the charges against him are "good or bad," and to protect him from being "put on trial without a proper charge." *Powell*, 287 U.S. at 69. As this case

demonstrates, once a person is erroneously accused of a crime, even "though he [is] not guilty," and "his defense [is] a perfect one," he "requires"—and is entitled to—"the guiding hand of counsel" "to establish his innocence." *Id.*

CONCLUSION

The judgment of the Fifth Circuit should be reversed.

Respectfully submitted.

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MARCH 2008

85 58362 B
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25pgs

No. 07-440

IN THE
Supreme Court of the United States

WALTER ALLEN ROTHGERY,
Petitioner,

v.

GILLESPIE COUNTY, TEXAS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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January 23, 2008

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Whether the Fifth Circuit Court of Appeals correctly held that petitioner's Sixth Amendment right to counsel had not attached – even though petitioner was arrested and brought before a magistrate judge who informed him of the accusation against him, found probable cause that he had committed the offense of which he was accused, and committed him to jail pending trial or the posting of bail – because no prosecutor was involved in petitioner's arrest or appearance before the magistrate judge.

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INTEREST OF *AMICUS CURIAE*[1]

Pursuant to Supreme Court Rule 37.3, the American Bar Association ("ABA"), as *amicus curiae*, respectfully requests that, in considering when the Sixth Amendment right to counsel attaches, the Court reject the Fifth Circuit's prosecutorial-involvement test and, instead, consider the broad-based consensus views and important policy recommendations that are embodied in Standard 5-6.1 of the ABA's Standards for Criminal Justice.

The ABA is the largest voluntary professional membership organization and the leading organization of legal professionals in the United States. The ABA's membership of more than 413,000 spans all 50 states and other jurisdictions, and includes attorneys in private law firms, corporations, nonprofit organizations, government agencies, and prosecutorial and public defender offices, as well as judges, legislators, law professors, and students.[2] The ABA's mission "is to be the national representative of the legal profession, serving the

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[1] Pursuant to Rule 37.6, *amicus curiae* certifies that no counsel for a party authored any part of this brief, and that no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of this brief have been filed with the Clerk of this Court.

[2] Neither this brief nor the decision to file it should be interpreted to reflect the views of any member of the judiciary associated with the American Bar Association. No inference should be drawn that any member of the Judicial Division Council has participated in the adoption or endorsement of the positions of this brief. This brief was not circulated to any member of the Judicial Division Council prior to filing.

public and the profession by promoting justice, professional excellence and respect for the law."[3]

Since its inception, and as one of the cornerstones of its mission, the ABA has actively promoted the goal of ensuring that all indigent criminal defendants have appointed counsel. The ABA's Goal II is "[t]o promote meaningful access to legal representation and the American system of justice for all persons regardless of their economic or social condition."[4]

One of the most prominent efforts of the ABA toward meaningful access to legal representation has been its Standards for Criminal Justice. The ABA has developed, refined, and approved these Standards over the last forty years through the efforts of broadly representative task forces made up of prosecutors, judges, defense lawyers, academics, and others, as well as by the wide and diverse membership of the ABA. These Standards have frequently been referred to, and adopted, by courts, legislatures, and executive branch law enforcement agencies. This Court in particular has repeatedly considered these Standards in determining the proper balance of individual rights and societal interests in the criminal justice system, including in the context of the Sixth Amendment right to counsel. See, *e.g.*, *Rompilla* v. *Beard*, 545 U.S. 374, 387 (2005); *Wiggins* v. *Smith*, 539 U.S. 510, 524 (2003); *McKaskle* v. *Wiggins*, 465 U.S. 168, 179 (1984); *Estelle* v. *Williams*, 425 U.S. 501, 504 (1976).

The ABA Standards do not purport to set forth interpretive conclusions or opinions as to the

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[3] ABA Mission and Association Goals, http://www.abanet.org/about/goals.html.

[4] *Id.*

requirements of the Constitution generally or the Sixth Amendment specifically. They do, however, represent the considered, consensus views of prosecutors, defenders and judges, and constitute a realistic and balanced approach to criminal law enforcement that has proven effective over time. As relevant to this case, and contrary to the Fifth Circuit's prosecutorial-involvement test, the Standards recommend involvement of defense counsel at the earliest stages of criminal proceedings against an indigent defendant.

SUMMARY OF ARGUMENT

For four decades, the ABA has adhered to the position that counsel should be provided to an indigent criminal defendant as soon as feasible after custody begins, formal charges are filed, *or* the accused appears before a committing magistrate, whichever is earliest. This position is presented in Standard 5-6.1 of the ABA's Standards for Criminal Justice. The ABA's Standards represent the consensus views of experienced criminal adjudicators and practitioners, and have informed this Court's constitutional analysis, including its interpretation of the Sixth Amendment.

This Court's cases, as well as Standard 5-6.1, recognize that timely participation by counsel protects individual liberty and promotes the fair and efficient administration of justice. Competent counsel can promptly move for the dismissal of unfounded charges, preserve evidence vital to later stages of proceedings, and secure pretrial release or favorable bail conditions for the accused. The failure to appoint counsel at the early stages may result in unnecessary incarceration and avoidable prosecutions; it may also deny indigent defendants

crucial protections and, in so doing, perpetuate discrimination between impecunious defendants and those of means.

Petitioner's plight illustrates the soundness of ABA Criminal Justice Standard 5-6.1 and the peril of the court of appeals' approach. Petitioner was innocent of the charged offense from the start. Had a competent attorney assisted him at or after his initial appearance, petitioner may well have permanently regained his liberty much earlier. Instead, he was indicted by a grand jury, rearrested, incarcerated and transferred to a different jail because of overcrowding. He was not finally cleared of charges until nine months after his initial arrest. The failure to appoint counsel in response to petitioner's early requests may have caused not only an unnecessary loss of liberty for petitioner, but an equally unnecessary expenditure of the state's limited judicial and penological resources.

ARGUMENT

I. THE ABA'S CRIMINAL JUSTICE STAN-DARD 5-6.1 REPRESENTS A BROAD-BASED CONSENSUS AND IS GROUNDED IN IMPORTANT POLICY CONSIDER-ATIONS.

While, as petitioner argues, this Court's precedents guide the proper resolution to the question presented in this case, the ABA's Criminal Justice Standard 5-6.1 provides additional reliable guidance regarding the question of when the right to counsel should be deemed to attach. Forged over the course of several decades by the most prominent authorities in the field and sharpened by the views of diverse interest groups, Standard 5-6.1 retains at its core the principle that the accused should have access to counsel from the very initial stages of criminal

proceedings. This longstanding position reflects policy considerations critical to the functioning of the criminal justice system.

A. Criminal Justice Standard 5-6.1

For the last forty years, the ABA has maintained a consistent view on the issue at the heart of this case – that indigent criminal defendants should be provided with competent counsel at the earliest possible stage of criminal proceedings, and certainly no later than the accused's initial appearance before a judicial officer. This policy is currently set forth in Standard 5-6.1 of the ABA's *Standards for Criminal Justice, Providing Defense Services* 5-6.1 (3d ed. 1992) (hereinafter "Standard 5-6.1"). Entitled "Initial provision of counsel," it states in relevant part:

> Upon request, counsel should be provided to persons who have not been charged or taken into custody but who are in need of legal representation arising from criminal proceedings. *Counsel should be provided to the accused as soon as feasible and, in any event, after custody begins, at appearance before a committing magistrate, or when formal charges are filed, whichever occurs earliest.*

Standard 5-6.1 (emphasis added). Although the Criminal Justice Standards have been revised twice, the ABA has never wavered from the core principle expressed in Standard 5-6.1 or from the basic rationale underlying it – that "representation by counsel is desirable in criminal cases both from the viewpoint of the defendant and of society." ABA Project on Minimum Standards for Criminal Justice, *Standards Relating to Providing Defense Services* 3 (Approved Draft 1968).

The initial version of Standard 5-6.1 was a product of the ABA's commitment almost a half-century ago to "the single most comprehensive and probably the most monumental undertaking in the field of criminal justice ever attempted by the American legal profession in our national history" – the development of nonmandatory standards that could be used to "improv[e] the fairness, efficiency and effectiveness of criminal justice in the state and federal courts." Warren E. Burger, *Introduction: The ABA Standards for Criminal Justice*, 12 Am. Crim. L. Rev. 251, 251-52 (1974); ABA, *Annual Report* 422 (1964).[5] Hundreds of professionals from all over the country and representing every aspect of the criminal justice system participated in a rigorous process of consultation and review that ultimately yielded "a balanced, practical work intended to walk the fine line between the protection of society and the protection of the constitutional rights of the accused individual." Burger, *Introduction: The ABA Standards for Criminal Justice, supra*, at 251-52.

The predecessor to Standard 5-6.1, which was born of this elaborate effort, expressed the ABA's view that counsel should be provided to the accused "as soon as is feasible after he is taken into custody, when he appears before a committing magistrate, or when he is formally charged, whichever occurs earliest." ABA Project on Minimum Standards for Criminal Justice, *Standards Relating to Providing Defense Services* § 5.1. (Approved Draft 1968). This position was not novel even in 1968, but rather reflected an already

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[5] *See also* Tom C. Clark, *The American Bar Association Standards for Criminal Justice: Prescription for an Ailing System*, 47 Notre Dame L. Rev. 429, 431 (1972) (noting the "enormity of the undertaking" and the "scholarly and high professional quality of the Standards themselves").

existing "consensus among judges, prosecutors and defense counsel that appointment of counsel at the earliest possible stage is a critical aspect of providing representation that is truly valuable and effective." *Id.* § 5.1 cmt. (internal citation omitted). Indeed, other standards adopted by the ABA in the early 1960s had similarly "emphasized the importance of early appointment." *Id.*

At no point did Standard 5.1's drafters indicate – nor has the ABA since suggested – that "the importance of early appointment" depended on whether a prosecutor was at that moment involved in the case. *Id.* Early representation was instead deemed advisable for two reasons independent of the particular prosecutor's role. First, the early assistance of counsel would protect "the immediate liberty of the accused and his opportunity to assist in the preparation of his defense," both of which "are at stake" throughout the initial stages of criminal proceedings. *Id.* Second, involving defense attorneys from the start would advance the efficient administration of justice by reducing the risk of wasteful prosecutions. "Representation at the earliest opportunity," the Commentary explained, "is essential to forestall the institution of unfounded proceedings through effective use of the preliminary examination and other screening devices." *Id.*

The ABA's policy, which reflects this dual rationale, remains the same today as it was four decades ago: all defendants should be provided with the assistance of counsel at the earliest possible stage of criminal proceedings, and certainly no later than the initial appearance before a magistrate where their liberty is

at stake.[6] This position is grounded in compelling policy considerations and accords with the rationale underlying this Court's right-to-counsel precedents.

B. The Standard's Rationales

Standard 5-6.1 reflects the ABA's longstanding recognition that the early assistance of counsel is beneficial both to the individual defendant and to society at large. One of the principal aims of Standard 5-6.1 has always been to safeguard the rights of the accused. The ABA recognized from the outset, and researchers have since confirmed, that the presence of counsel at the very earliest stages of a criminal proceeding protects "both the immediate liberty of the accused and his opportunity to assist in the preparation of his defense." *Standards Relating to the Provision of Defense Services* § 5.1 cmt. (Approved Draft 1968). Counsel can immediately interview crucial witnesses while key events are still fresh in their minds and before they become difficult to locate. ABA *Standards for Criminal Justice, Providing Defense Services* § 5-5.1 cmt. (2d ed. 1980). If the accused remains incarcerated, moreover, counsel will be able "to marshal facts in support" of pretrial release. *Id.* Counsel's intervention "can also

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[6] In 1998, the ABA House of Delegates reaffirmed that counsel should be provided as early as possible when it approved a resolution recommending: (1) that all jurisdictions ensure that defendants are represented by counsel at their initial judicial appearance where bail is set; and (2) that adequate resources be provided to ensure the recommended level of representation. An accompanying report emphasized that the resolution was designed to remedy the "specific issues" of "fair representation of the poor and unnecessary prison overcrowding." ABA Criminal Justice Section, *Report to the House of Delegates* 3 (Aug. 1998). The resolution thus constituted "an important and necessary complement" to Standard 5-6.1. *Id.*

sometimes serve to convince the prosecutor to dismiss unfounded charges, to charge the accused with less serious offenses, or to divert the case entirely from the criminal courts." *Id.*; see also *Standards for Criminal Justice, Providing Defense Services* 5-6.1 cmt. (3d ed. 1992).

Subsequent studies, including those conducted in the bail-hearing context, demonstrate the real-world foundations of Standard 5-6.1. These studies confirm what the ABA has long known from collective experience – that defense counsel's prompt entrance into the case protects both the immediate liberty interest and subsequent trial rights of the accused. For instance, one study funded by the National Institute of Justice found that early representation by appointed counsel improved the accuracy of bail setting and the early release of defendants without danger to the public or to the attorney-client relationship. U.S. Dep't of Justice, Nat'l Inst. of Justice, *Early Representation by Defense Counsel Field Test: Final Evaluation Report* 361-65 (The URSA Institute, Aug. 1984) ("*Field Test*"); see also Douglas L. Colbert, *Thirty-Five Years After* Gideon: *The Illusory Right to Counsel at Bail Proceedings*, 1998 U. Ill. L. Rev. 1 (1998) (arguing that the absence of counsel at the bail hearing negatively affects the trust relationship between client and attorney, the crucial initial investigation of the case, and the preparation for trial); Douglas L. Colbert et al., *Do Attorneys Really Matter? The Empirical and Legal Case for the Right of Counsel at Bail*, 23 Cardozo L. Rev. 1719 (2002).[7]

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[7] The latter study was conducted by the Baltimore City Lawyers at Bail Project, which provided legal representation to "nearly 4,000 lower-income defendants accused of nonviolent offenses" at the initial bail hearing. Colbert, *supra*, at 1720. It

Early participation by defense counsel addresses another concern underlying Standard 5-6.1: promoting the efficient administration of justice. Appointed counsel can play a significant role in reducing the burden on congested court dockets and overcrowded jails. Burgeoning prison populations, it is widely recognized, constitute a serious and persistent problem across the nation.[8] What is more, well over half of the inmates of local jails are those who have not been convicted of the crime with which they are charged, but are instead incarcerated awaiting arraignment, revocation, or trial. U.S. Dep't of Justice, Bureau of Justice Statistics, *Prison and Jail Inmates at Midyear 2006*, at 6, http://www.ojp.usdoj.gov/bjs/pub/pdf/pjim06.pdf (last visited Jan. 22,

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found that indigent defendants represented by counsel at their bail hearing were over two-and-a-half times as likely as unrepresented defendants with similar characteristics to be released on their own recognizance, and two-and-a-half times as likely to obtain a reduction of bail initially set following arrest. *Id.* at 1752-56.

[8] For example, a recent study by the Bureau of Justice Statistics indicated that "local jails nationwide operated at an average of 94% of rated capacity," meaning that some "exceeded their capacity." U.S. Dep't of Justice, Bureau of Justice Statistics, *Prison and Jail Inmates at Midyear 2006*, at 7, http://www.ojp.usdoj.gov/bjs/pub/pdf/pjim06.pdf (last visited Jan. 22, 2008). At least one state, Michigan, has a "County Jail Overcrowding Emergency Act," which allows sheriffs to defer the admission of certain offenders, among other emergency measures. Mich. Comp. Laws Ann. § 801.51 *et seq.*, as amended. In other states, jails have operated – and in some cases continue to operate – under consent decrees entered as a result of overcrowding complaints. *See, e.g., Rhodes* v. *Chapman*, 452 U.S. 337, 354 n.1 (1981) (Brennan, J., concurring in judgment); *Castillo* v. *Cameron County*, 238 F.3d 339 (5th Cir. 2001); Michael Higgins, *Cook Inmates Bunking in Shifts; Move Eliminates Cots on Floor, but Some Say Crowding Remains*, Chi. Trib., Dec. 2, 2007, at C4.

2008); see also U.S. Dep't of Justice, Bureau of Justice Statistics, *Profile of Jail Inmates, 2002*, at 2, http://www.ojp.usdoj.gov/bjs/pub/pdf/pji02.pdf (last visited Jan. 22, 2008). Early representation by counsel makes it possible to "quickly identify individuals who are eligible for pretrial release, thereby freeing limited jail space for those who require pretrial detention." ABA Criminal Justice Section, *Report to the House of Delegates* 1 (Aug. 1998). It also

> allow[s] immediate identification of charges that are inappropriate for criminal prosecution, permitting the criminal justice system to devote its limited resources to more serious cases. With lawyers involved at the initial court proceeding, many cases also would be resolved much sooner – in days, rather than weeks or months.

Id. (footnote omitted). Other reliable studies confirm the ABA's conclusion. See *Field Test* at 361-65 (finding that early representation will benefit the public fisc by, among other things, significantly reducing case-processing time and the overall number of cases in the system at one time). As this Court has previously noted, efficiency-based factors of this sort are germane to the analysis of the Sixth Amendment right to counsel. See *Iowa* v. *Tovar*, 541 U.S. 77, 93 (2004) (rejecting rule requiring provision of detailed warning concerning waiver of Sixth Amendment right to counsel in part because the rule could impede "the prompt disposition of the case" and waste the resources of the state or the defendant).

That Standard 5-6.1 helps to advance both efficiency and liberty interests is further demonstrated by the choice of many jurisdictions to adopt a similar, if not identical, policy in their criminal codes, procedural rules, or rules of court.

See, *e.g.*, Wash Super. Ct. Crim. R. 3.1(b)(1) (court rule reciting Standard 5-6.1 verbatim); Ariz. R. Crim. P. 6.1(a) (timing requirement analogous to Standard 5-6.1). The federal government, the District of Columbia, and at least eight other states – California, Connecticut, Delaware, Florida, Massachusetts, North Dakota, West Virginia, and Wisconsin – guarantee the assistance of counsel at bail hearings. See Fed. R. Crim. P. 44(a); D.C. Code § 23-1322; Cal. Penal Code § 859; Conn. Gen. Stat. §54-1b; Del. Super. Ct. Crim. R. 44; Fla. R. Crim. P. 3.130(c)(1); Mass. R. Crim. P. 8; N.D. Ct. R. Crim. P. 44; W. Va. R. Crim. P. 44; Wis. Stat. Ann. § 970.02. *Amicus*'s research also indicates that, with some variations by locality, many other states require that defendants be provided access to counsel beginning at or shortly after their initial appearance. See, *e.g.*, Me. R. Crim. P. 5C; N.Y. Crim. Proc. Law §§ 170.10, 180.10; Pa. R. Crim. P. 122 & cmt. These rules reveal that legislatures and courts nationwide understand "the importance of providing counsel . . . at the earliest possible time after arrest." See Fed. R. Crim. P. 44, advisory comm. note.

Finally, and perhaps most importantly, Standard 5-6.1 helps to reduce discrimination on the basis of economic status. See *Standards for Criminal Justice, Providing Defense Services* 5-6.1 cmt. So long as indigent defendants are not "provided counsel at the earliest possible time, discrimination occurs between the poor defendant and the defendant of financial means." *Id.* Only those of means are "able to afford counsel," and will accordingly have access to "legal representation well before formal commencement of adversary proceedings." *Id.* Standard 5-6.1 seeks to eliminate this disparity by "provid[ing] for the indigent accused similar representation opportuni-

ties." *Id.* For this reason, Standard 5-6.1 remains central to the mission of the ABA and advances a principal tenet of the judicial system: equal justice under the law.

II. THE ABA'S STANDARD 5-6.1 IS CONSIS-TENT WITH THE PRAGMATIC ASSESS-MENT THIS COURT CONDUCTS IN DE-FINING THE SIXTH AMENDMENT RIGHT TO COUNSEL.

Standard 5-6.1 represents the profession's considered judgment that defense counsel should participate from the earliest possible stages of the proceedings – even those stages as to which this Court has not yet recognized a Sixth Amendment right to counsel. See Standard 5-6.1 cmt. Standard 5-6.1 is relevant to the Court's current Sixth Amendment analysis for at least three reasons.

First, this Court has undertaken a "pragmatic assessment" in determining the scope of the Sixth Amendment right to counsel. See *Patterson* v. *Illinois*, 487 U.S. 285, 298 (1988). The Court evaluates "the usefulness of counsel to the accused at the particular proceeding, and the dangers to the accused of proceeding without counsel." *Id.*; see also *Maine* v. *Moulton*, 474 U.S. 159, 170 (1985) (noting the Court's "[r]ecogni[tion] that the right to the assistance of counsel is shaped by the need for the assistance of counsel"). Standard 5-6.1 speaks directly to this inquiry, representing the considered assessment of the bench and bar that the assistance of counsel during the early stages of a criminal case is, as a practical matter, vital. This unwavering "policy prescription[] of the legal profession" should be considered in defining the scope and nature of the right to counsel, which "has historically been an evolving concept" responsive to the contributions and views of the profession. See *Argersinger* v. *Hamlin*,

407 U.S. 25, 44 (1972) (Burger, C.J., concurring in the result).[9]

Second, Standard 5-6.1 is consistent with the rationale underlying this Court's Sixth Amendment precedents in point. This Court has long acknowledged that for many defendants the period from "their arraignment until the beginning of their trial" will be "the most critical" in the entire proceedings. *Powell* v. *Alabama*, 287 U.S. 45, 57 (1932); see also *Kirby* v. *Illinois*, 406 U.S. 682, 688-89 n.6 (1972) (plurality opinion) (quoting this aspect of *Powell* with approval). And because "depriv[ing] a person of counsel during the period prior to trial may be more damaging than denial of counsel during the trial itself," the Court has likewise "recognized that the assistance of counsel cannot be limited to participation in a trial." *Moulton*, 474 U.S. at 170. This principle applies with even greater force in the present era, when the overwhelming majority of criminal cases are resolved by way of guilty pleas and thus never reach the trial stage.[10]

Third, this Court has repeatedly expressed the very concerns that animated the drafters of the initial

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[9] This Court has repeatedly noted its regard for the ABA's Criminal Justice Standards by citing and relying on them in the Sixth Amendment context. *See, e.g.*, *Rompilla*, 545 U.S. at 387; *Wiggins*, 539 U.S. at 524; *McCoy* v. *Court of Appeals of Wis., Dist. 1*, 486 U.S. 429, 436 n.8 (1988). The ABA submits that Standard 5-6.1 should be given similar consideration.

[10] *See* U.S. Dep't of Justice, Bureau of Justice Statistics, *Compendium of Federal Justice Statistics, 2003*, at 2, http://www.ojp.usdoj.gov/bjs/pub/pdf/cfjs0302.pdf (96% of convicted federal defendants pleaded guilty in 2003) (last visited Jan. 22, 2008); U.S. Dep't of Justice, Bureau of Justice Statistics, *Felony Sentences in State Courts, 2002*, at 1, http://www.ojp.usdoj.gov/bja/pub/pdf/fssc02.pdf (95% of state felony convictions are obtained through guilty pleas) (last visited Jan. 22, 2008).

version of Standard 5-6.1. The Court has reasoned, for instance, that "the guiding hand of counsel . . . is essential" from the earliest stages of criminal proceedings "to protect the indigent accused against an erroneous or improper prosecution." *Coleman* v. *Alabama*, 399 U.S. 1, 9 (1970). Counsel may well "expose fatal weaknesses in the State's case that lead the magistrate to refuse to bind the accused over." *Id.* But even if she does not achieve this favorable result, counsel can at the very least "be influential . . . in making effective arguments for the accused on such matters as . . . bail." *Id.* The bail decision, in turn, determines the accused's immediate liberty, "any deprivation of [which] is a serious matter." See *Argersinger*, 407 U.S. at 41 (Burger, C.J., concurring in result); see also *Gerstein* v. *Pugh*, 420 U.S. 103, 114 (1975) ("Pretrial confinement may imperil the suspect's job, interrupt his source of income, and impair his family relationships. Even pretrial release may be accompanied by burdensome conditions that effect a significant restraint on liberty") (citations omitted). These considerations buttress the Court's conclusion that the Sixth Amendment right to counsel, "[w]hatever else it may mean," entitles an accused "to the help of a lawyer at or after the time that judicial proceedings have been initiated against him – whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." *Brewer* v. *Williams*, 430 U.S. 387, 398 (1977) (internal citations and quotation marks omitted).

Standard 5-6.1 responds to the concerns that underlie this Court's decisions and reflects the "pragmatic" view that counsel is indeed "useful[]" at early stages where defendants face "dangers" that competent counsel could easily avert. See *Patterson*,

487 U.S. at 298. That was indisputably true for petitioner here.

III. PETITIONER'S CASE ILLUSTRATES THE ADVANTAGES OF THE ABA'S APPROACH AND THE DANGERS OF THE FIFTH CIRCUIT COURT OF APPEALS' PROSECU-TORIAL INVOLVEMENT TEST.

Petitioner's odyssey highlights the very concerns that animated the ABA's adoption of Standard 5-6.1 and that underlie this Court's right-to-counsel precedents. Petitioner was arrested and jailed because of a police officer's erroneous understanding that petitioner had previously been convicted of a felony and was therefore unlawfully in possession of a firearm – a simple mistake, but precisely of the type that counsel is best suited to spot and to correct. Pet. Br. at 4. Had a competent attorney assisted petitioner at or immediately following his initial appearance, petitioner may have rapidly ceased to interest the prosecutors, the courts, and the jails, and would likely have suffered minimal loss of freedom.

But petitioner was unable to afford an attorney, and the county failed to appoint one for him. *Id.* at 4-7. As a result, he was indicted by a grand jury, rearrested, brought before a magistrate for a second time, incarcerated, transferred to a different jail because of overcrowding, and was finally cleared of the charges a full nine months after his initial appearance before a magistrate. *Id.* at 4-8. Thus, depriving petitioner of an attorney's early attention did more than cause petitioner to suffer an unnecessary and inequitable loss of liberty. It caused judges, prosecutors, law enforcement officials, jail administrators, and citizen grand jurors needlessly to expend time and resources on petitioner's processing, prosecution, and incarceration.

In no way was petitioner's need for counsel diminished by the lack of prosecutorial involvement at his initial appearance. On the contrary, the absence of a prosecutor's professional attention to the case may have made it even less likely that the initial error would be rapidly corrected. This alone counsels against adoption of the Fifth Circuit's approach in cases such as petitioner's.

The ABA's long-standing position, consistent with this Court's precedents and with the principle of equal justice under the law, suggests that petitioner should have been provided counsel, at the latest, as soon as his limited waiver of assistance had expired – that is, following his initial appearance before the magistrate. This is true regardless of whether the power of the State was exercised through a prosecutor or with a prosecutor's knowledge. Promptly honoring petitioner's request for assistance would have prevented the needless loss of individual liberty and promoted the efficient administration of justice.

CONCLUSION

The ABA respectfully submits that this Court should reverse the decision of the court of appeals.

Respectfully submitted,

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January 23, 2008

45 58361 a (6) 37pg

FILED

No. 07-440

IN THE

Supreme Court of the United States

WALTER ALLEN ROTHGERY,

Petitioner,

v.

GILLESPIE COUNTY, TEXAS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Brendlin v. California,
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Brewer v. Williams,
430 U.S. 387 (1977) ..... *passim*

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Dunaway v. New York,
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Gerstein v. Pugh,
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Gideon v. Wainwright,
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Kirby v. Illinois,
406 U.S. 682 (1972) 3

Cited Authorities

Page

Lomax v. Alabama,
629 F.2d 413 (5th Cir. 1980) 3-4, 9-10

McGee v. Estelle,
625 F.2d 1206 (5th Cir. 1980) 4, 9

Michigan v. Jackson,
475 U.S. 625 (1986) ..... *passim*

Minnesota v. Murphy,
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Missouri v. Seibert,
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Nix v. Williams,
467 U.S. 431 (1984) 14

Powell v. Alabama,
287 U.S. 45 (1932) 26

Stansbury v. California,
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Tague v. Louisiana,
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United States v. Matlock,
415 U.S. 164 (1974) 14

Yarborough v. Alvarado,
541 U.S. 652 (2004) 6

Cited Authorities

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18 U.S.C. § 3146 (1975) 24

Tex. Code Crim. Proc.
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art. 17.441 24
art. 17.47 24

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OTHER MATERIALS

ACLU of Texas,
Prisons and Jail Accountability Project (PJAP),
http://www.aclutx.org/projects/prisons.php .. 22

ACLU of Texas,
Prisons and Jail Project,
http://www.aclutx.org/projects/
prisonspg.php?pid=93 .....22, 23

Alan J. Beck & Timothy A. Hughes,
Sexual Violence Reported by Correctional Authorities, 2004, Bureau of Justice Statistics (2005),
http://www.ojp.usdoj. gov/bjs/pub/pdf/
svrca04.pdf 23

Barry Mahoney & Walt Smith,
Pretrial Release and Detention in Harris County: Assessment and Recommendations (2005), http://effectivealt.web.aplus.net/
sitebuildercontent/sitebuilderfiles/reportfinal
harriscountypretrial.doc 11, 24

Bureau of Justice Statistics,
Indigent Defense Statistics: Racial Disparity and the Use of Publicly Financed Counsel,
http://www.ojp.usdoj.gov/bjs/id.htm#racial .. 17

Cited Authorities

Page

Dottie Carmichael et al.,
Evaluating the Impact of Direct Electronic Filing in Criminal Cases: Closing the Paper Trap, Public Policy Research Institute, Texas A&M University (2006), http://www.courts. state.tx.us/tfid/pdf/FinalReport7-12-06wackn.pdf ... 11, 21

Dottie Carmichael et al.,
Study to Assess the Impacts of the Fair Defense Act on Texas Counties, Public Policy Research Institute, Texas A&M University (2005), http://www.courts.state.tx.us/tfid/Resources.asp 11-12, 20, 25

Michael Puisis,
Findings on the Medical and Mental Health Programs of the Dallas County Jails (2005), http://www.dallasnews.com/sharedcontent/dws/img/03-05/jailhealth3.pdf 22

Michael K. Moore & Allan K. Butcher,
Examining the Impact of Criminal Defense Reform in Texas: Has the Fair Defense Act Been Effective? (2005), http://www.courts. state.tx.us/tfid/pdf/ButcherMooreSPWSA05.pdf ..20, 25

Polly Ross Hughes,
Revised Numbers Show Jail Overcrowding is Worse, Houston Chronicle, Aug. 5, 2005, *available at* http://www.solutionsfortexas.net/id408.html 22

Cited Authorities

Page

Press Release, Bexar County, Texas District Attorney's Office, *Burglary Ring Busted* (Dec. 20, 2007), http://www.bexar.org/da2/PressRelease/2007/12202007.htm 11

Press Release, Denton County, Texas, Sheriff's Office, *$1/2 Million Worth of Heroin Seized, 3 Arrested*, http://sheriff.dentoncounty.com/View_Press_Release.asp?id=175. 10-11

Texas Appleseed Fair Defense Project, *The Fair Defense Report, Analysis of Indigent Defense Practices in Texas* (2000), http://www.texasappleseed.net/pdf/projects_fairdefense_fairref.pdf 19-20

Texas Commission on Jail Standards, *Jail Population Report* (2008), http://www.tcjs.state.tx.us/docs/abrerpt.pdf 19, 22

Texas Task Force on Indigent Defense, *2006 Annual Report and Expenditure Report: Evidence-based Practices Are Good for Public Defense* (2007), http://www.courts.state.tx.us/tfid/pdf/TFIDFY06ARFINAL012507.pdf 16

Wesley Shackelford, *Review of Tarrant County Indigent Defense System* (2006), http://www.courts.state.tx.us/tfid/pdf/Tarrant%20County%20Report.pdf) ... 16-17

STATEMENT OF INTEREST[1]

The Brennan Center for Justice at New York University School of Law is a non-partisan public policy and law institute that focuses on fundamental issues of democracy and justice. An important part of the Brennan Center's work is its effort to close the "justice gap" by strengthening public defender services and working to secure the promise of *Gideon v. Wainwright*, 372 U.S. 335 (1963). Because the subjective test adopted by the court below jeopardizes indigent defendants' Sixth and Fourteenth Amendment rights, the Brennan Center has a strong interest in this case.

The NAACP Legal Defense and Educational Fund, Inc. (LDF) is the nation's oldest civil rights law firm, founded as an arm of the NAACP in 1939 by Charles Hamilton Houston and Thurgood Marshall. LDF was chartered by the Appellate Division of the Supreme Court of New York in 1940 as a non-profit legal aid society "to render legal aid gratuitously to such Negroes as may appear to be worthy thereof, who are suffering legal injustices by reason of race or color and unable to employ and engage legal aid and assistance on account of poverty." Since 1957, LDF has operated independently from the NAACP. This Court has recognized that LDF "has a corporate reputation for expertness in presenting

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission. Both Petitioner and Respondent have consented to the filing of this brief, and pursuant to Rule 37.3(a), the letters of consent have been filed with the Clerk of the Court.

and arguing the difficult questions of law that frequently arise in civil rights litigation." *NAACP v. Button*, 371 U.S. 415, 422 (1963). LDF is interested in this civil rights case because the lower court's narrow approach to determining when Sixth Amendment rights attach jeopardizes the rights of indigent defendants, including African Americans and other minorities who studies show are, on average, more likely to require the appointment of counsel.

The National Legal Aid and Defender Association (NLADA) is a nonprofit corporation that works to support indigent defender services and civil legal assistance to those who cannot afford lawyers. NLADA has approximately 700 program members, representing 12,000 lawyers, including nonprofit organizations, government agencies, legal aid organizations, and law firms. NLADA American Council of Chief Defenders is a leadership council that is dedicated to promoting fair justice systems and ensuring that citizens who are accused of crimes have adequate legal representation. The question of precisely when the right to counsel attaches is one of significant importance to NLADA and its members.

SUMMARY OF ARGUMENT

The Sixth Amendment right to counsel is so familiar—so ingrained in our society—that the constitutional importance of the right is "obvious." *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963). The parties here do not dispute that the right to counsel can attach long before trial. Pet'r Br. at 2; Respon. Cert. Opp. at 7. Nor is there any dispute that Sixth Amendment rights attach upon "[t]he initiation of adversary judicial criminal proceedings." *Kirby v. Illinois*, 406 U.S. 682, 689 (1972). The central questions here are *when* such judicial criminal proceedings are initiated and *how* that is determined.

As Petitioner demonstrates, these questions were squarely answered in *Brewer v. Williams*, 430 U.S. 387 (1977), and *Michigan v. Jackson*, 475 U.S. 625 (1986), which—applying *Kirby*'s straightforward, objective approach—held that adversary judicial proceedings had begun when a defendant was brought before a judicial officer, was apprised of the accusation against him, and had restrictions imposed on his liberty to ensure he answered that accusation.

Contrary to *Brewer* and *Jackson*, the Fifth Circuit did not apply any objective standard in the proceedings below. Instead, drawing on pre-*Jackson* Fifth Circuit precedent, the court employed a subjective test to determine when Sixth Amendment rights attach—a test that, as the Fifth Circuit itself put it, requires an inquiry into "the sometimes elusive degree to which the prosecutorial forces of the state have focused on an

individual." Pet. App. 6a (quoting *Lomax v. Alabama*, 629 F.2d 413, 415 (5th Cir. 1980)). Reasoning that the inquiry depends on when prosecuting attorneys have "focused on" a citizen, the Fifth Circuit held that "adversary judicial proceedings cannot initiate without some prosecutorial awareness or involvement." *Id.* at n.7 (paraphrasing *McGee v. Estelle*, 625 F.2d 1206, 1208 (5th Cir. 1980)).

The Fifth Circuit's approach departs not only from *Brewer* and *Jackson*, but also from this Court's repeated holdings rejecting nearly identical subjective tests to determine when other fundamental rights attach.

For example, when considering the appropriate test for determining when a citizen has been placed in "custody," thereby triggering the Fifth Amendment right to *Miranda* warnings, this Court expressly rejected lower court holdings that *Miranda* rights attached only when the questioning officers' suspicions had "focused on" the defendant. *Stansbury v. California*, 511 U.S. 318, 321, 323 (1994) (per curiam). Instead, the Court applied an objective test that addressed "how a reasonable person in the position of the individual being questioned would gauge the breadth of his or her 'freedom of action.'" *Id.* at 325. (quotation omitted). Similarly, when considering the appropriate test for determining when there has been a "seizure" triggering Fourth Amendment rights, this Court rejected lower court tests that anchored attachment in part to whether government officials "intended to investigate" the citizen detained. *Brendlin v. California*, 127 S. Ct. 2400, 2408 (2007) ("[W]e have repeatedly rejected attempts to

introduce this kind of subjectivity into Fourth Amendment analysis"). Rather, the Court opted for an objective standard that addressed whether "a reasonable person would have believed that he was not free to leave." *Id.* at 2405 (quotation omitted).

This Court likewise should reject the subjective test employed by the Fifth Circuit to determine whether a defendant has become an "accused"—*i.e.*, "faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law." *Jackson*, 475 U.S. at 631 (quoting *United States v. Gouveia*, 467 U.S. 180, 189 (1984)).

The Fifth Circuit's subjective test cannot be reconciled with *Brewer* and *Jackson*, is out of line with this Court's Fourth and Fifth Amendment jurisprudence, and conflicts with the "noble ideal[s]," *Gideon*, 372 U.S. at 344, of the Sixth Amendment. This Court should reverse the decision below.

ARGUMENT

I. AS IT HAS IN THE FOURTH AND FIFTH AMENDMENT CONTEXTS, THIS COURT SHOULD REJECT A SUBJECTIVE TEST FOR DETERMINING WHEN SIXTH AMENDMENT RIGHTS ATTACH

A. The Lower Court's Subjective Test, Like Those Rejected for Determining When Fourth and Fifth Amendment Rights Attach, Should Not Govern the Sixth Amendment

This Court repeatedly has rejected application of subjective tests, like the one applied below, in determining when certain Fourth and Fifth Amendment rights attach.

For example, in determining whether a suspect is in "custody" triggering *Miranda* rights, the Court has consistently applied an objective standard, rejecting lower court tests that are nearly indistinguishable from the one applied by the Fifth Circuit here. *See Stansbury*, 511 U.S. at 324-26; *see also Yarborough v. Alvarado*, 541 U.S. 652, 662-63 (2004).

In *Stansbury*, law enforcement officers took the defendant to the station and questioned him concerning an encounter with a murder victim. 511 U.S. at 320-21. The officers did not provide *Miranda* warnings when they began the questioning because they considered someone else the lead suspect. *Id.* at 320. It was only after the defendant's statements aroused suspicions that the officers gave the defendant his *Miranda* warnings. *Id.* After the state charged him with first-degree murder, the defendant moved to suppress statements made

before he was *Mirandized*, and the evidence discovered as a result of those statements. *Id.* at 321. The California courts held that the statements and evidence were admissible because the defendant was not "in custody"—the event triggering the right to *Miranda* warnings—until the questioning police officers' suspicions had "focused on" him. *Id.* at 321-22.

This Court rejected the California courts' subjective test. It held that attachment of *Miranda* rights "depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned." *Id.* at 323. Citing prior precedents, the Court reiterated the virtues of an objective inquiry over trying to parse the state of mind and "focus" of government officials. *Id.* at 323-24 (citing *Beckwith v. United States*, 425 U.S. 341, 345-46 (1976) ("[It] was the compulsive aspect of custodial interrogation, and not the strength or content of the government's suspicions at the time the questioning was conducted, which led the Court to impose the *Miranda* requirements with regard to custodial questioning."); *Berkemer v. McCarty*, 468 U.S. 420, 442 (1984) ("[T]he only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation."); *Minnesota v. Murphy*, 465 U.S. 420, 431 (1984) ("The mere fact that an investigation has focused on a suspect does not trigger the need for *Miranda* warnings in noncustodial settings, and the probation officer's knowledge and intent have no bearing on the outcome of this case.")).

An objective inquiry, the Court reasoned, is required because a defendant cannot be expected "to probe [an] officer's innermost thoughts" to determine whether the

officer has "focused on" the defendant. *Id.* at 324. Further, this Court recognized that the "threat to a citizen's Fifth Amendment rights that *Miranda* was designed to neutralize has little to do with" the subjective views of officers and should not be anchored to the potentially "evolving" intent or understandings of government officials. *See id.* at 324-25 (quotation omitted).

To this end, this Court adopted an objective test to determine whether a person is in "custody": "[H]ow a reasonable person in the position of the individual being questioned would gauge the breadth of his or her 'freedom of action' .... [I]t is the objective surroundings, and not any undisclosed views, that control the *Miranda* custody inquiry." *Id.* at 325 (quotation omitted).

This Court has applied a similar objective test in considering whether a citizen has been "seized" within the meaning of the Fourth Amendment's protection against unreasonable searches and seizures, again rejecting subjective tests used by lower courts. *Brendlin*, 127 S. Ct. at 2405-06 (describing longstanding objective test used for determining whether "seizure" occurred as "whether 'a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter'"). In *Brendlin*, this Court recently applied this test to consider whether the passenger of an automobile pulled over during a traffic stop is "seized" under the Fourth Amendment. *Id.* at 2403. In finding a seizure in those circumstances, the Court rejected a subjective test applied by a state high court that would have hinged Fourth Amendment rights in large part on whether the officer "intended to investigate" the passenger when the car was pulled over. *Id.* at 2408. This

Court concluded that "we have repeatedly rejected attempts to introduce this kind of subjectivity into Fourth Amendment analysis." *Id.*

In sum, in assessing the proper standards for determining when certain Fourth and Fifth Amendment rights attach, this Court has adopted objective tests and expressly rejected subjective inquiries virtually indistinguishable from the one applied by the Fifth Circuit. There is no principled basis for a departure from this approach in the Sixth Amendment context.

B. The Reasons for Applying Objective Rather Than Subjective Tests in the Fourth and Fifth Amendment Contexts Have Equal Force in the Sixth Amendment Context

The rationale articulated by this Court for using objective tests to determine when Fourth and Fifth Amendment rights attach is equally applicable to the Sixth Amendment analysis.

As a threshold matter, the trigger for Fourth, Fifth, or Sixth Amendment rights should not vary or be dependent on the elusive and evolving "focus" or awareness of government officials. *See Brendlin*, 127 S. Ct. at 2408; *Stansbury*, 511 U.S. at 324-25. The Fifth Circuit's test does just that, by concluding that "an adversary criminal proceeding has not begun in a case"—and hence the right to counsel has not attached—"where the prosecution officers are unaware of either the charges or the arrest." Pet. App. 6a (quoting *McGee*, 625 F.2d at 1208). As the Fifth Circuit acknowledged below, this test essentially requires an inquiry into the "sometimes elusive degree to which the prosecutorial

forces of the state have *focused on* an individual." *Id.* (quoting *Lomax*, 629 F.2d at 415 (emphasis added)). This is precisely the type of "elusive" inquiry this Court rejected as improperly subjective and unworkable in the Fourth and Fifth Amendment contexts. *Stansbury*, 511 U.S. at 321, 324 (rejecting lower court test that attached rights to *Miranda* warning on whether the officers' suspicions had "focused on" the defendant); *Brendlin*, 127 S. Ct. at 2408-09 (rejecting lower court test that attached Fourth Amendment rights based on whether officer "intended to investigate" passenger of automobile).

Beyond the difficulty in delving into a government official's mindset—which requires a speculative inquiry to determine what a prosecutor "knows," what he or she is "focused on," and when he or she becomes "involved"—a subjective test makes the attachment of Sixth Amendment rights contingent on arbitrary and/or fortuitous circumstances. For instance, "awareness" of a Texas prosecutor could fluctuate depending on the day of arrest, since jails may be required to report their arrestees to county prosecutor offices on particular days. *See* Tex. Code Crim. Proc. art. 2.19 ("On the first day of each month, the sheriff shall give notice, in writing, to the district or county attorney, where there be one, as to all prisoners in his custody, naming them, and of the authority under which he detains them."). Awareness or "involvement" could also depend on any number of other random circumstances, such as whether a sheriff's or prosecutor's office issues a press release shortly after a high-profile arrest. *See, e.g.*, Press Release, Denton County, Texas, Sheriff's Office, *$1/2 Million Worth of Heroin Seized, 3 Arrested*, http://sheriff. denton

county.com/View_Press_Release. asp?id=175; *see also* Press Release, Bexar County, Texas District Attorney's Office, *Burglary Ring Busted* (Dec. 20, 2007), http://www.bexar.org/da2/PressRelease/2007/12202007.htm.

Indeed, the right could vary depending on the sophistication, or lack thereof, of a jurisdiction's computer intake system. Some Texas counties, for example, have computer systems that provide arrest and detention information simultaneously to prosecutors, law enforcement officers, jail personnel, and clerks. Prosecutors in these jurisdictions use these systems to pre-screen cases early in the process before an initial appearance. Dottie Carmichael et al., *Evaluating the Impact of Direct Electronic Filing in Criminal Cases: Closing the Paper Trap*, Public Policy Research Institute, Texas A&M University 2-3 (2006) [hereinafter Carmichael 2006], http://www.courts.state.tx.us/tfid/pdf/FinalReport7-12-06wackn.pdf.[2] Thus, government "awareness," and Sixth Amendment rights, could depend on how electronic information is processed, which is not only arbitrary, but varies from county to county. *See* Dottie Carmichael et al., *Study to Assess the Impacts of the Fair Defense Act on Texas Counties*, Public Policy Research Institute, Texas A&M University 27-28 (2005) [hereinafter Carmichael 2005], http://www.courts.state.tx.us/tfid/Resources.asp (noting that in Dallas County, prosecutors generally pre-screen cases within 72 hours of arrest, but that few other counties can meet that pace). Similarly, under the Fifth Circuit's test, the right could

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[2] *See also* Barry Mahoney & Walt Smith, *Pretrial Release and Detention in Harris County: Assessment and Recommendations* 2-3 (2005), http://effectivealt.web.aplus.net/sitebuildercontent/sitebuilderfiles/reportfinalharriscounty pretrial.doc.

vary depending on the resources and staffing of the various prosecutor offices in Texas's 254 counties, leaving the Sixth Amendment right not to objective standards, but instead to the wide-ranging daily work-loads of individual prosecutors.

Finally, leaving the timing for "awareness," "focus" or "involvement" in the first instance to the voluntary acts of government officials creates the opportunity for manipulation to gain prosecutorial advantages.[3]

By contrast, the objective approach applied in *Brewer* and *Jackson* provides a clear and consistent framework for protecting Sixth Amendment rights. It fixes the attachment of the right to counsel on the occurrence of objectively verifiable proceedings and avoids, in keeping with Fourth and Fifth Amendment precedents, uncertain, evolving subjective inquiries of government officials. As *Brewer* and *Jackson* hold, under that objective approach, "adversary judicial proceedings" have begun, at the very least, when an arrestee is brought for his first appearance before a judge, who informs him of the accusation against him and restricts his liberty (including release on bail). That event provides an objective marker that the person formerly a "suspect" has become an "accused" within the meaning of the Sixth Amendment. Reaffirming that the right to counsel attaches in these circumstances would allow

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[3] *Cf. Gerstein v. Pugh*, 420 U.S. 103, 118 (1975) ("A democratic society . . . naturally guards against the misuse of the law enforcement process. Zeal in tracking down crime is not in itself an assurance of soberness of judgment. Disinterestedness in law enforcement does not alone prevent disregard of cherished liberties. Experience has therefore counseled that safeguards must be provided against the dangers of the overzealous as well as the despotic." (quotation omitted)).

the government—including courts, prosecutors, police officers, and those implementing criminal justice procedures and policies—to know with a high degree of certainty when the right to counsel is triggered. *Cf. Dunaway v. New York*, 442 U.S. 200, 213-14 (1979) ("A single, familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront."). Because uncertainty and delay surrounding the appointment of counsel imposes a real harm on defendants, using an objective marker to determine the right to counsel is far preferable to relying on elusive understandings, happenstance, or a fact-intensive, backward-looking, and often time-consuming inquiry.

Moreover, an objective test also avoids unwarranted departure from other constitutional principles. A subjective test, like the one used below, that seeks to determine a prosecutor's "focus" or knowledge departs from the principle, recognized by this Court in *Jackson*, that knowledge is imputed from one state actor to another for Sixth Amendment purposes:

> Sixth Amendment principles require that we impute the State's knowledge from one state actor to another. For the Sixth Amendment concerns the confrontation between the State and the individual. One set of state actors (the police) may not claim ignorance of defendants' unequivocal request for counsel to another state actor (the court).

475 U.S. at 634 (footnote omitted).

Further, a subjective test, which requires a defendant to establish government knowledge or "focus," places an undue burden on the accused. For example, though the decision below is not entirely clear, the Fifth Circuit appears to have presumed that the burden of showing prosecutorial knowledge, focus, or involvement rests on a criminal defendant. Pet. App. 7a ("Rothgery provides no reason why the officer's acts should somehow be imputed to the prosecutor's office or should otherwise be interpreted to signal that Rothgery was opposed by the prosecutorial forces of the state."). Such an approach is inconsistent with this Court's precedents imposing such burdens on the government, not the accused. *See, e.g., Missouri v. Seibert*, 542 U.S. 600, 608 n.1 (2004) (government bears burden to show an individual's waiver of *Miranda* rights and voluntariness of confession); *Nix v. Williams*, 467 U.S. 431, 444-45, n.5 (1984) (government bears burden to show inevitable discovery of evidence obtained by unlawful means); *United States v. Matlock*, 415 U.S. 164, 177 (1974) (government bears burden to show voluntariness of consent to search). Placing the burden on the government is particularly appropriate where, as here, the relevant information is in the hands of the government. *See Tague v. Louisiana*, 444 U.S. 469, 470-71 (1980) (per curiam) ("Since the State is responsible for establishing the isolated circumstances under which the interrogation takes place and has the only means of making available corroborated evidence of warnings given during incommunicado interrogation, the burden is rightly on its shoulders." (quoting *Miranda v. Arizona*, 384 U.S. 436, 475 (1966)).

Ultimately, an objective test focuses, as it should, on the nature and consequences of the proceeding itself.

By shifting the focus away from the proceeding, the Fifth Circuit's test injects improper subjectivity and arbitrariness into the Sixth Amendment analysis. That subjective approach has been rejected for the Fourth and Fifth Amendments. It should be rejected here.

II. "ADVERSARY JUDICIAL PROCEEDINGS" HAVE BEGUN WHEN A PERSON IS BROUGHT BEFORE A MAGISTRATE, INFORMED OF THE ACCUSATION AGAINST HIM, AND HAS RESTRAINTS IMPOSED ON HIS LIBERTY

The objective test employed by *Brewer* and *Jackson* properly recognizes that a suspect becomes an "accused" within the meaning of the Sixth Amendment, adversary judicial proceedings commence, and his right to counsel therefore attaches, once he is informed of the accusations against him by a judicial officer and committed to jail or bail. There can be no question that an accused at this stage in the system has been "faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law." *Jackson*, 475 U.S. at 631 (quotation omitted). A detailed examination of the Texas pre-indictment system bears this out.

A. Pre-Indictment Proceedings in Texas: Arrest to Magistration

Under Texas law, the police may arrest citizens in a variety of circumstances with or without a warrant. Where, as here, the situation involves a warrantless arrest, Texas law generally permits such arrests when individuals are "found in suspicious places and under circumstances which reasonably show that such persons have been guilty of some felony . . . breach of the peace

. . . or threaten, or are about to commit some offense against the laws." Tex. Code Crim. Proc. art. 14.03(a)(1). Warrantless arrests can be made for conduct within an officer's view, or, for various offenses, outside an officer's presence. *Id.* art. 14.03(b); *see also id.* art. 14.04 (warrantless arrest permissible when officer receives "representation of a credible person, that a felony has been committed, and that the offender is about to escape"). Mr. Rothgery, for instance, was arrested without a warrant for unlawful possession of a firearm by a felon.

Though the circumstances allowing for warrantless arrest are wide-ranging, they are still limited by statute, and few citizens would know or understand when an officer's arrest is improperly made.

As defined by Texas law, an arrest, with or without a warrant, occurs when the accused is "actually placed under restraint or taken into custody by an officer . . . ." *Id.* art. 15.22. In making an arrest an officer may use force. *Id.* art. 15.24. And, with certain exceptions, *id.* art. 14.05, he "may break down the door of any house for the purpose of making an arrest, if he be refused admittance after giving notice of his authority and purpose." *Id.* art. 15.25. In Texas, approximately six out of ten of those arrested are indigent.[4]

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[4] "In 2006, 62 percent of felony defendants in Texas courts received appointed counsel." Texas Task Force on Indigent Defense, *2006 Annual Report and Expenditure Report: Evidence-based Practices Are Good for Public Defense* 3 (2007), http://www.courts.state.tx.us/tfid/pdf/TFIDFY06AR FINAL 012507.pdf. The rates can vary significantly by county. In some

(Cont'd)

After an arrest (with or without a warrant), individuals may sit in jail for up to 48 hours before being taken to a magistrate. *See* Tex. Code Crim. Proc. arts. 14.06(a), 15.17(a).

B. The Initial Appearance: A Citizen is Brought Before a Court, Advised of the Accusations, and His or Her Liberty Is Restrained

After spending up to two days in jail following a warranted or warrantless arrest, an arrestee in the Texas system is next brought before a magistrate for an initial appearance in what typically is called the "magistration." There, he is advised "of the *accusation* against him and of any affidavit filed therewith." *Id.* art. 15.17(a) (emphasis added). He also is advised of "his right to retain counsel, of his right to remain silent, of his right to have an attorney present during any interview with peace officers or attorneys representing

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(Cont'd)
counties the felony appointment rate is over 80%; in others less than 30%. Wesley Shackelford, *Review of Tarrant County Indigent Defense System* 3 (2006), http://www.courts.state.tx.us/tfid/pdf/Tarrant%20County%20Report.pdf. (containing statistics on 10 Texas counties). Statistics show that nationwide African Americans and other minorities are, on average, more likely to require the appointment of counsel: According to the Bureau of Justice Statistics, as of 2001, "69% of white State prison inmates reported they had lawyers appointed by the court," whereas "77% of blacks and 73% of Hispanics had publicly financed attorneys. In Federal prison black inmates were more likely than whites and Hispanics to have public counsel: 65% for blacks, 57% for whites and 56% for Hispanics." Bureau of Justice Statistics, *Indigent Defense Statistics: Racial Disparity and the Use of Publicly Financed Counsel*, http://www.ojp.usdoj.gov/bjs/id.htm#racial.

the state, of his right to terminate the interview at any time, and of his right to have an examining trial."[5] *Id.* In cases where the defendant is arrested without a warrant, for convenience, the probable cause determination required by *Gerstein v. Pugh*, 420 U.S. 103 (1975), often is combined with the initial appearance. *See* Tex. Code Crim. Proc. 14.06(a).

In Mr. Rothgery's magistration, for example, he was confronted with an Affidavit of Probable Cause sworn by the arresting officer that stated the "charge" against him, the magistrate found that "probable cause existed for the arrest of the individual *accused* therein," and informed Rothgery that he was "*accused* of the criminal offense of: unlawful possession of a firearm by a felon." Pet App. 33a-35a (emphasis added).

During this initial appearance, the magistrate is statutorily required to "inform the person arrested of the person's right to request the appointment of counsel if the person cannot afford counsel .... [and] of the procedures for requesting appointment of counsel...." Tex. Code Crim. Proc. art. 15.17(a). The magistrate at Mr. Rothgery's magistration provided this information. Pet. App. 35a-37a.

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[5] Under Texas law, "[t]he accused in any felony case shall have the right to an examining trial before indictment ... whether he be in custody or on bail...." Tex. Code Crim. Proc. art. 16.01. This pre-indictment right gives an accused the opportunity to "examine into the truth of the accusation made." *Id.* The accused and government may call and question witnesses. *Id.* arts. 16.06-.07. After the examining trial, the judge can make an order committing the defendant to jail, grant bail, or discharge him for lack of probable cause. *Id.* art. 16.17.

C. At the Magistration, the Court Grants or Denies the Accused Bail

During this initial appearance, the magistrate "admit[s] the person arrested to bail if allowed by law," or jails those who lack the means to post bail. *See, e.g.*, Tex. Code Crim. Proc. arts. 15.17(a), 17.27. "'Bail' is the security given by the *accused* that he will appear and answer before the proper court the *accusation* brought against him . . . ." *Id.* art. 17.01 (emphasis added). Unlike many defendants,[6] Mr. Rothgery managed to post bail.

Historically in Texas, those denied bail often waited weeks—or even months—before they were indicted and provided counsel. As one report found:

> Delay in appointment of counsel is a major concern in many counties. For instance, in some counties, indictment triggers the appointment of counsel. Indictment can occur months after arrest, leaving the defendant in jail with no access to counsel during that period. Even in counties where it is not indictment that triggers appointment, but some other earlier appearance before the court, that might not occur for weeks after arrest. In either case, even for those defendants out on bond, the practice whereby counsel is appointed some or a considerable

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[6] According to the Texas Commission on Jail Standards Jail Population Report, as of January 1, 2008, more than 50% of the state's county and city jail detainee population are pretrial and have not been convicted of a crime. *See generally* Texas Commission on Jail Standards, *Jail Population Report* (2008), http://www.tcjs.state.tx.us/docs/abrerpt.pdf.

> time after arrest works to the defendant's detriment in that counsel is impeded in pursuing witnesses and factual leads in a timely, expeditious fashion.

Texas Appleseed Fair Defense Project, *The Fair Defense Report, Analysis of Indigent Defense Practices in Texas* 29 (2000), http://www.texasappleseed.net/pdf/projects_fairdefense_fairref.pdf; *accord* Michael K. Moore & Allan K. Butcher, *Examining the Impact of Criminal Defense Reform in Texas: Has the Fair Defense Act Been Effective?* 14 (2005), http://www.courts.state.tx.us/tfid/pdf/ButcherMooreSPWSA05.pdf.[7]

The Fifth Circuit's rule—under which counsel need not be appointed until indictment absent some pre-indictment prosecutorial involvement—would permit such lengthy stays in jail with no access to counsel. Moreover, that would be so even for defendants who, like Rothgery, could readily prove their innocence and obtain dismissal of the charges against them with a lawyer's help. Under the Fifth Circuit's rule, that is, "a law-abiding citizen wrongfully arrested may be compelled to await the grace of a Dickensian bureaucratic machine, as it churns its cycle" for an indefinite period—without the assistance of counsel to demonstrate "that there is absolutely no reason to hold him, that a mistake has been made." *County of Riverside v. McLaughlin*, 500 U.S. 44, 71 (1991) (Scalia, J., dissenting).

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[7] *Accord* Carmichael 2005, *supra*, at 27 ("At every study site except Dallas, stakeholders recall that before [the Fair Defense Act], indigent defendants charged with both misdemeanors and felonies were commonly detained for months with no advocate to protect their legal rights and interests. Since the FDA, defendants may still be held in custody while prosecutors review their case. However, it is no longer without access to an attorney.").

Because of these and other problems, Texas law was amended to provide that a person denied or financially unable to post bail at magistration is provided counsel within three business days in counties, like Gillespie County, with populations of less than 250,000, and within one business day in counties with a population of over 250,000. *See* Tex. Code Crim. Proc. art. 1.051(c). These reforms, however, do not apply to persons, like Mr. Rothgery, released on bond. *See id.* art. 1.051(j). Moreover, even in Texas, some studies suggest that large percentages of defendants are not appointed counsel within the statutory time frames. *See* Carmichael 2006, *supra*, at 98, Figure 9-3 (reflecting percent of individuals without counsel 4, 7, 14 days of confinement). In one county, for example, only 20% of defendants had counsel in four days and only 73% of defendants had received counsel after 14 days of confinement. *Id.* In another county, only 38% of defendants were appointed counsel within four days and only 65% of defendants received counsel within two weeks. *Id.* Even the county with the highest appointment rates had only slightly more than half of the defendants (56%) receiving court appointed counsel within four days, and only 88% within two weeks. *Id.*[8]

Most significantly, as discussed above, the Fifth Circuit's rule would permit reversal of these reforms and permit states to incarcerate defendants without access to counsel, potentially for as long as several months, while they await indictment. Such jail time—which, in

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[8] The study could not draw conclusions as to why this was the case, though some of these individuals may not have requested counsel (and thus not triggered the deadlines for appointment which begin upon the defendant's request).

the case of innocent defendants like Mr. Rothgery, serves no valid purpose—presents serious risks. Texas jails are overcrowded. *See* ACLU of Texas, *Prisons and Jail Accountability Project (PJAP)*, http://www.aclutx.org/projects/prisons.php. For example, in Harris County, at least 1,700 jail inmates reportedly were sleeping on mattresses on the floor in June 2005. *See* Polly Ross Hughes, *Revised Numbers Show Jail Overcrowding is Worse*, Houston Chronicle, Aug. 5, 2005, *available at* http://www.solutionsfortexas.net/id408.html; *see also* Texas Commission on Jail Standards, *Jail Population Report* (2008), http://www.tcjs.state.tx.us/docs/abrerpt.pdf. (reflecting county-by-county jail populations and capacities as of January 2008).

The facilities and conditions often fail to meet the standards set by the Texas Commission on Jail Standards. *See* ACLU of Texas, *Prisons and Jail Project*, http://www.aclutx.org/projects/prisonspg.php?pid=93. Further, aside from the overcrowded poor conditions, those jailed face serious health risks. In Bexar County, for instance, more than 900 inmates tested positive for tuberculosis in 2005 and 301 tested positive for methicillin resistant staphylococcus aureus. *See id.*; *see also* Michael Puisis, *Findings on the Medical and Mental Health Programs of the Dallas County Jails* 30-32 (2005), http://www.dallasnews.com/sharedcontent/dws/img/03-05/jailhealth3.pdf (discussing significant tuberculosis problems in Dallas County jails). In addition, Texas jails have a significant problem with hepatitis C. *See* ACLU of Texas, *Prisons and Jail Project*, http://www.aclutx.org/projects/prisonspg.php?pid=93 ("In a public hearing before the Subcommittee of Healthcare and Special Populations of the House

Correction Committee, staff from the Correctional Managed Health Committee stated that 30% of prisoners received from the county jails test positive for Hepatitis C upon entry to the Texas Department of Criminal Justice.").

Those jailed also face a serious risk of violence, including sexual violence. In 2004, the Bureau of Justice Statistics reported hundreds of cases of sexual assault in local jails nationwide. *See* Alan J. Beck & Timothy A. Hughes, *Sexual Violence Reported by Correctional Authorities, 2004*, Bureau of Justice Statistics (2005), http://www.ojp.usdoj.gov/bjs/pub/pdf/svrca04.pdf. *Id.* at App. Table 1a. (providing statistics on sexual violence in Texas prisons).

Moreover, even a defendant who is able to post bond and obtain release on bail following his initial appearance suffers significant harms:

> He is required to appear in court at the state's command. He is often subject . . . to the condition that he seek formal permission from the court (at significant expense) before exercising what would otherwise be his unquestioned right to travel outside the jurisdiction. Pending prosecution, his employment prospects may be diminished severely, he may suffer reputational harm, and he will experience the financial and emotional strain of preparing a defense.

Albright v. Oliver, 510 U.S. 266, 278 (1994) (Ginsburg, J., concurring). The mere possibility that the defendant could be returned to jail for violating bail conditions is

by itself a significant intrusion on his liberty. *Cf. Alabama v. Shelton*, 535 U.S. 654, 658 (2002) ("[A] suspended sentence that may 'end up in the actual deprivation of a person's liberty' may not be imposed unless the defendant was accorded 'the guiding hand of counsel' in the prosecution for the crime charged." (quotation omitted)). Further, as this Court has recognized, "pretrial release may be accompanied by burdensome conditions that effect a significant restraint of liberty." *Gerstein*, 420 U.S. at 114 (citing 18 U.S.C. §§ 3146(a)(2), (5)).[9]

Perhaps most significant of all, as this case demonstrates, the consequences of delaying appointment of counsel can be devastating: such delay prevents counsel from promptly investigating the facts before witnesses disappear or evidence is destroyed; assessing the defendant's mental and emotional state; ensuring that the accused understands and can invoke his rights and that the state properly follows its statutory

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[9] In *Gerstein*, this Court cited as examples of "burdensome conditions" provisions of the federal law in effect at the time allowing bail conditions, such as "restrictions on the travel, association, or place of abode of the person," 18 U.S.C. § 3146(a)(2) (1975), and "any other condition deemed reasonably necessary to assure appearance as required," *id.* § 3146(a)(5). Texas law specifies many other conditions, allowing the government to order defendants: to home confinement, Tex. Code Crim. Proc. art. 17.44(a)(1); to electronic monitoring and curfew, *id.* art. 17.43(a); to submit to DNA samples, *id.* art. 17.47; to undergo controlled substance testing, *id.* art. 17.44(a)(2); and to submit to the installation of a device that may prevent ignition of a motor vehicle, *id.* art. 17.441. A review of one county's approach to bond found that the extent of conditions depended on the specific judge; indeed, one judge imposed a total of 1,240 conditions on 301 different defendants. Mahoney & Smith, *supra*, at 16-17.

procedures (such as the right to an examining trial, *see supra* note 5); and redressing unjust errors like the one made in Mr. Rothgery's case. As one Texas report put it, "[w]aiting until indictment to provide an attorney, which was not an uncommon occurrence in many pre FDA jurisdictions, was not unlike awaiting until the autopsy to provide a physician." Moore & Butcher, *supra*, at 14; *see also id.* ("For the right to an attorney to be meaningful .... [t]he counsel should be assigned within a reasonable number or hours or days and not a matter of weeks or months after the arrest."). When the "stakes are this high," *cf. Gerstein*, 420 U.S. at 114, the appointment of counsel is essential if the Sixth Amendment is to provide meaningful protection to the accused.

The recent Texas experience suggests that appointing counsel early on has minimal cost and substantial benefits.[10] But without a constitutional requirement, there could be resistance to adopting similar procedures in other jurisdictions. Indeed, affirmation of the Fifth Circuit's approach could encourage jurisdictions currently providing counsel upon the initial appearance to succumb to common misperceptions concerning the cost of providing counsel in such circumstances and change course. That would dramatically undermine the Sixth Amendment's protections.

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[10] *See* Carmichael 2005, *supra*, at 27-28.

In sum, "[w]hatever else it may mean, the right to counsel granted by the Sixth and Fourteenth Amendments means at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him 'whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.'" *Brewer*, 430 U.S. at 398 (quotation omitted). Given the constitutional issues at stake, using an objective standard to determine when the right to counsel attaches is far preferable to relying on the subjective, arbitrary, and elusive "focus," "awareness," or "involvement" of government officials.

The objective test applied by this Court in *Brewer* and *Jackson* is straightforward, well-reasoned, and workable. The Fifth Circuit's subjective test, on the other hand, cannot be reconciled with *Brewer* and *Jackson*, is inconsistent with this Court's Fourth and Fifth Amendment jurisprudence, and denies a poor defendant an essential right: "the guiding hand of counsel at every step in the proceedings against him." *Powell v. Alabama*, 287 U.S. 45, 69 (1932). This Court should reject the Fifth Circuit's subjective test and reverse.

CONCLUSION

For the foregoing reasons, the judgment of the Fifth Circuit should be reversed.

Respectfully submitted,

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No. 07-440

FILED
JAN 23 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

WALTER ALLEN ROTHGERY,
Petitioner,

v.

GILLESPIE COUNTY, TEXAS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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January 23, 2008

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Mary Prosser, *Reforming Criminal Discovery: Why Old Objections Must Yield To New Realities*, 2006 Wis. L. Rev. 541 (2006) 17, 18

1 *The Public Defender Service for the District of Columbia, Criminal Practice*

Institute: Criminal Practice Manual (2006) 17, 18, 19

3 James L. Robertson, *Encyclopedia of Mississippi Law* (Jeffrey Jackson & Mary Miller eds. 2007) 15

INTEREST OF AMICUS CURIAE[1]

The National Association of Criminal Defense Lawyers is the preeminent organization advancing the mission of the criminal defense bar to ensure justice and due process for persons accused of crime or wrongdoing. A professional bar association founded in 1958, NACDL's 12,000-plus direct members in 28 countries — and 90 state, provincial and local affiliate organizations totaling more than 40,000 attorneys — include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges committed to preserving fairness and promoting a rational and humane criminal justice system. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in its House of Delegates.

The question of precisely when the right to counsel attaches is one of obvious importance to NACDL and its members. As our members are keenly aware, counsel delayed is often effective counsel denied, and an accused's immediate access to counsel can be the difference — as it was for Mr. Rothgery — between freedom and confinement. Fortunately, most States have recognized this

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[1] No counsel for a party authored this brief in whole or in part. No person or entity other than NACDL and their counsel made a monetary contribution to the preparation or submission of this brief, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of the brief. Both petitioner and respondent have consented to the filing of this brief, and, pursuant to Rule 37.3(a), NACDL has filed the letters of consent with the Clerk of the Court.

important truth, and they provide counsel at or immediately after the accused's first appearance before a judge, at which time he is informed of the accusation against him. With members in all 50 States and the District of Columbia, and with substantial experience in all aspects of the representation of criminal defendants, NACDL is uniquely positioned to inform the Court of the practice in the States and of the consequences of the radical reworking of that practice that Respondent proposes here.

SUMMARY OF ARGUMENT

I. The Sixth Amendment, as applied to the States by the Fourteenth Amendment, guarantees that no individual shall face a criminal accusation by the government without the assistance of counsel. This Court has long recognized that the right to counsel is the primary protection standing between the defendant and the vast power of the State.

In determining the time at which the Sixth Amendment demands the provision of counsel, this Court has focused on the first formal proceeding as a trigger point — the stage at which the individual develops from a "suspect" to an "accused." *See McNeil v. Wisconsin*, 501 U.S. 171, 180-81 (1991) ("The Sixth Amendment right to counsel attaches at the first formal proceeding against an accused."). At this point, a defendant must be able to rely on counsel to act as a barrier between him and the State — to manage the intricacies of the procedural web of the law, to investigate vigorously essential evidence, to secure his pre-trial rights, and to begin

preparations for his defense at trial. This Court's cases thus hold that the right to counsel attaches, at the latest, after initial arraignment. *See Michigan v. Jackson*, 475 U.S. 625 (1986); *Brewer v. Williams*, 430 U.S. 387 (1977).

II. The Fifth Circuit nevertheless held that the Sixth Amendment right to counsel does not attach after initial arraignment whenever the prosecution is not yet involved in the case. This holding is flatly contrary to this Court's case law and ignores the fundamental purpose of the right to counsel. Though counsel is surely needed when a prosecutor stands as a representative of the State in a criminal proceeding, this Court has made clear that the right to counsel exists not just to enable the defendant to meet the arguments of an "experienced and learned" adversary, but also — and of critical importance — to guide the accused through an "intricate procedural system." *United States v. Ash*, 413 U.S. 300, 306, 309 (1973); *see also Evitts v. Lucey*, 469 U.S. 387, 394 n.6 (1985).

III. This Court's affirmance of its existing case law and rejection of the Fifth Circuit's novel prosecutorial involvement test would conform to existing practice in the States. A vast majority of the States, along with the federal system, already provide counsel either before, at, or just after initial arraignment. Thus, while the Sixth Amendment right at the core of this case has enormous implications for criminal defendants, a decision striking down the Fifth Circuit rule will not wreak havoc in States throughout the country. Rather, this Court's decision would merely push the few States

who fail to provide counsel after the first formal proceeding in line with the great majority of States that do.

IV. Should the Fifth Circuit rule stand, the practical consequences of the "prosecutorial involvement" test would be severe. Prompt investigation is critical to effective representation. Delaying an accused's access to counsel after initial arraignment for weeks or even months until indictment will hinder counsel's ability to find and talk to witnesses, gather physical evidence, and document their clients' mental, physical, and emotional states near the time of the alleged crime. Further, defendants will be forced to face the procedural hurdles embedded in our criminal justice system without the assistance of trained counsel. As a result, they may lose important rights, for example, to testify before the grand jury and to obtain a speedy indictment. The consequences for criminal defendants would be harsh. But so, too, would the consequences for the Constitution, which recognizes that a robust reading of the Sixth Amendment right to counsel is the best defense against injustice.

ARGUMENT

I. Mr. Rothgery's Constitutional Right To Counsel Attached Upon His Initial Arraignment, A Formal Proceeding In Which He Was "Accused" Of A Crime.

The Sixth Amendment, made applicable to the States through the Fourteenth Amendment, provides that "[i]n all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for

his defense." This Court's cases have sensibly understood the amendment to require that, at the latest, once a defendant has appeared before a court that has officially informed him of the accusation against him, a criminal prosecution has begun and the Sixth Amendment has attached. At that point, the accused has the right to the "Assistance of Counsel" to navigate the procedural shoals that lie before him. *See, e.g.*, *McNeil*, 501 U.S. at 180-81 ("The Sixth Amendment right to counsel attaches at the first formal proceeding against an accused."). In the decision below, the Fifth Circuit engrafted an additional requirement, namely, that, in order for the Sixth Amendment to attach, a prosecutor must have been involved in that first proceeding or in the underlying arrest. That requirement is flatly inconsistent with this Court's cases. Moreover, it reflects a cramped view of the protections provided by the Sixth Amendment and would be an unwise and unwarranted restriction on the principal bulwark against unjust confinement.

1. Both the Sixth Amendment and this Court's cases reflect the importance of the right to counsel to the assurance of a fair and just administration of the criminal law. The Court has long recognized that "[t]he right [of a defendant] to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law.... He requires the guiding hand of counsel at every step in the proceedings against him." *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932); *see also United States v. Cronic*, 466 U.S.

648, 654 (1984). The Court's implementation of the Sixth Amendment right thus reflects "the recognition and awareness that an unaided layman ha[s] little skill in arguing the law or in coping with an intricate procedural system." *Ash*, 413 U.S. at 307; *see also Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) (noting that "any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth."). *See generally Wright v. Van Patten*, No. 07-212, __ S. Ct. __, 2008 WL 59980, at *5 (2008) (Stevens, J., concurring).

2. In defining the point at which the Sixth Amendment attaches, this Court's cases have sensibly focused on the first formal proceeding in which the "suspect" becomes the "accused." *Brewer v. Williams* and *Michigan v. Jackson* establish the governing law. In *Brewer*, the defendant was arraigned before a judge on an outstanding arrest warrant. The Court embraced the "well established" position that the Sixth Amendment had attached: "Whatever else it may mean, the right to counsel granted by the Sixth and Fourteenth Amendments means at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him 'whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.'" 430 U.S. at 398 (quoting *Kirby v. Illinois*, 406 U.S. 682, 689 (1972)). In the Court's view, "[t]here can be no doubt...that judicial proceedings had been initiated against Williams," because "[a] warrant had been issued for his arrest, he had been arraigned on

that warrant before a judge in a...courtroom, and he had been committed by the court to confinement in jail." *Id.* at 399.

In *Michigan v. Jackson*, this Court reaffirmed that the right to counsel attaches no later than initial arraignment. At that point, a person "who had previously been just a 'suspect' has become an 'accused,'" and the Sixth Amendment attaches. *Jackson*, 475 U.S. at 632. The Court held that "[t]he arraignment signals 'the initiation of adversary judicial proceedings' and thus the attachment of the Sixth Amendment." *Id.* at 629 (quoting *United States v. Gouveia*, 467 U.S. 180, 187 (1984)); *see also Jackson*, 475 U.S at 630 n.3 (rejecting the State's contention that the right to counsel had not attached as "untenable" "[i]n view of the clear language in our decisions about the significance of [the] arraignment").

In short, this Court's cases make resoundingly clear that, as Justice Scalia stated for the Court in *McNeil*, 501 U.S. at 180-81, "[t]he Sixth Amendment right to counsel attaches at the first formal proceeding against an accused."

3. Against this backdrop, it defies this Court's precedent to claim that, following the Texas procedure at issue here, Mr. Rothgery did not stand "accused" and did not have the right to appointed counsel. At this initial appearance, the magistrate clearly informed Mr. Rothgery, as required by the governing statute, *see* Tex. Code. Crim. P. art. 15.17, that he was "'accused of the criminal offense of unlawful possession of a firearm by a felon." Pet.

App. 35a. Moreover, the magistrate informed Mr. Rothgery that charges on that offense "will be filed in...District Court." *Id.* Accordingly, the State — through the person of the judge — unequivocally conveyed that Mr. Rothgery was accused of a crime and that the State intended to proceed against him. Thus, following his initial arraignment, Mr. Rothgery stood "accused" within the meaning of the Sixth Amendment. Under settled law, his right to counsel had attached.

II. The Fifth Circuit's "Prosecutorial Involvement" Test Both Ignores The Sixth Amendment's Commitment To Providing A Guide Through The "Intricate Procedural System" And Would Be Difficult To Apply.

Misconstruing this Court's decision in *Kirby v. Illinois*, the Fifth Circuit held that Mr. Rothgery's initial appearance was insufficient to trigger his right to counsel because "the relevant prosecutors were not aware of or involved in Rothgery's arrest or appearance before the magistrate." Pet. App. 7a. But there is no support for this so-called "prosecutorial involvement" test in *Kirby* or any other decision of this Court. Indeed, that approach is directly at odds with *Brewer* and *Jackson*. In *Kirby*, this Court addressed the question whether the right to counsel attached during a "police station showup" following the suspect's initial arrest. *Kirby v. United States*, 406 U.S 682, 690-91 (1972). The critical issue before the Court was thus the application of the Sixth Amendment in advance of *any* judicial criminal proceedings. Indeed, the Court made that clear, noting that the question was the application of the

Sixth Amendment to a showup that occurred before the initiation of any formal judicial proceedings. *See id.* at 684.

The Fifth Circuit relied, then, not on any inherent inconsistency between *Kirby* and this Court's holdings in *Brewer*, *Jackson*, and *McNeil*. Rather, it plucked out of context this Court's statement in *Kirby* that the initiation of judicial criminal proceedings is significant, in part, because "it is only then that the government has committed itself to prosecute," and only then "that a defendant finds himself faced with the prosecutorial forces of organized society." 406 U.S. at 689. That language from *Kirby* cannot bear the weight the Fifth Circuit would put on it.

At the outset, of course, *Kirby* pre-dates this Court's decisions in *Brewer*, *Jackson*, and *McNeil*, all of which recognize unambiguously that the Sixth Amendment attaches "at the first formal proceeding against the accused." But more importantly, nothing in *Kirby*, *Brewer*, *Jackson*, or *McNeil* supports the Fifth Circuit's prosecutorial involvement test. Indeed, quite to the contrary. This Court has been clear that a defendant's right to counsel attaches upon the first formal proceeding – without any suggestion that a prosecutor must be involved in either the underlying arrest or the formal appearance.

Further, the Fifth Circuit's approach ignores the broader purpose of the Sixth Amendment. To be sure, this Court's cases dealing with the right to counsel "have often focused on the defendant's need

for an attorney to meet the adversary presentation of the prosecutor," *Evitts*, 469 U.S. at 394 n.6, and one principal aim of the Amendment is to level the playing field when an accused faces an "experienced and learned counsel." *See Johnson v. Zerbst*, 304 U.S. 458, 462-63 (1938) (noting that the Sixth Amendment "embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel"); *see also United States v. Gouveia*, 467 U.S 180, 189 (1984) (noting one purpose of the amendment is to "protect[] the unaided layman at critical confrontations with his adversary"); *Kirby*, 406 U.S. at 688-89. Thus, when a prosecutor *has* committed to prosecute, the rationale for the Sixth Amendment protections surely applies with significant force.

But this Court has repeatedly recognized that "meet[ing] the adversary presentation of the prosecutor" is *not* the sole purpose of the Sixth Amendment right. *See e.g., Evitts*, 469 U.S. at 394 n.6. To the contrary, the Sixth Amendment protects "a different, albeit related, aspect of counsel's role, that of expert professional whose assistance is necessary in a legal system governed by complex rules and procedures for the defendant to obtain a decision at all — much less a favorable decision — on the merits of the case." *Id.* Thus, time and again, this Court has recognized counsel's critical role as a "guide through complex legal technicalities," *Ash*, 413 U.S. at 307, providing advice to those "immersed

in the intricacies of substantive and procedural criminal law," *Jackson*, 475 U.S. at 631 (quoting *Gouveia*, 467 U.S. at 189); *see, e.g.*, *Halbert v. Michigan*, 545 U.S. 605, 621-22 (2005) (noting that "[n]avigating the appellate process without a lawyer's assistance is a perilous endeavor for a layperson, and well beyond the competence of individuals, like Halbert, who have little education, learning disabilities, and mental impairments" and that "Michigan's very procedures for seeking leave to appeal after sentencing on a plea, moreover, may intimidate the uncounseled"); *Ash*, 413 U.S. at 307 ("A concern of more lasting importance was the recognition and awareness that an unaided layman had little skill in arguing the law or in coping with an intricate procedural system."); *see also Gouveia*, 467 U.S. at 189 (noting that the Court has extended the right to counsel to situations in which "the accused [is] confronted, just as at trial, *by the procedural system*, or by his expert adversary, *or by both*") (internal quotation marks omitted; alteration in original) (emphasis added). The Fifth Circuit's approach ignores this critical function of counsel.

Moreover, while underprotecting core Sixth Amendment values, the Fifth Circuit's "prosecutorial involvement" test introduces uncertainty and fact-specific inquiry into an area that benefits strongly from clear lines. That is, rather than adopting a bright-line rule in which the right to counsel attaches at a point that is no later than after formal proceedings against the accused, the Fifth Circuit adopted an approach in which analysis of the right to counsel requires all parties to look to the "specific

circumstances of th[e] case and the nature of the affidavit filed at [the defendant's] appearance before the magistrate." Pet. App. 11a. As the brief for petitioner makes clear, that approach is an invitation to disaster. *See, e.g.*, *Davis v. United States*, 512 U.S. 452, 461 (1994) (noting the benefits of "a bright line that can be applied by officers in the real world of investigation and interrogation" and the harms of compelling "difficult judgment calls" about entitlement to counsel). *Cf. Fare v. Michael C.*, 442 U.S. 707, 718 (1979) (noting benefits of clear rules in the Fifth Amendment context that inform police, prosecutors, and the Courts "with specificity as to what they may do").

In short, the Fifth Circuit's prosecutorial involvement test is an unwise and ill-considered addition to this Court's Sixth Amendment jurisprudence that little serves the values that the Sixth Amendment was intended to protect.

III. The Overwhelming Majority Of The States Already Provide Counsel Upon Initial Arraignment, Without Regard To The Presence Of Prosecutorial Involvement.

There is nothing novel, revolutionary, or impractical about the position advanced here that judicial proceedings commenced — and the Sixth Amendment right to counsel attached — when Mr. Rothgery was taken before a magistrate who informed him of the criminal accusation against him and found probable cause based on a police officer's sworn affidavit, and was then confined to jail pending trial or the posting of bail. Indeed, that

position is not only compelled by Supreme Court precedent concerning the initiation of formal judicial proceedings; it is also in line with the current practice of the vast majority of the States, as well as the federal government. Thus, reaffirming the law established in *Kirby*, *Brewer*, *Jackson*, and *McNeil* will not dramatically alter the functioning of state criminal justice systems across the country.

Considering the clear precedent this Court has established on the matter, it comes as no surprise that a survey of the federal criminal justice system, the fifty States, and the District of Columbia confirms that the vast majority already provide counsel, at the latest, upon the completion of an initial appearance such as Mr. Rothgery's initial appearance before the magistrate. An appendix to this brief contains the results of that survey. *See* App. 1a. The survey reveals that 43 States, the District of Columbia, and the federal government supply counsel to indigent defendants either before, at, or directly after an initial appearance. By contrast, there are only seven jurisdictions where the State does not provide counsel directly after initial appearance in all instances, or where there is ambiguity on the matter. Even in some of these seven jurisdictions, NACDL members report that counsel is often provided upon initial appearance, notwithstanding the statutory scheme. *See generally* App. 1a (summarizing practice).

As these statistics illuminate, the States and the federal government generally already provide counsel to criminal defendants at the initiation of

formal proceedings — at or just after the defendant's initial appearance.

Some even go beyond this mark, supplying counsel as soon after arrest as is logistically possible. New Mexico, for example, stipulates that "[a] needy person who is being detained by a law enforcement officer...is entitled to be represented by an attorney to the same extent as a person having his own counsel and to be provided with the necessary services and facilities of representation, including investigation and other preparation." N.M. Stat. § 31-16-3(A). Thus, under New Mexico law, defendants are not only entitled to counsel following initial appearance; they have the right to appointed assistance upon *initial detainment*. *See also id.* 31-16-3(B)(1). North Carolina, too, provides counsel to indigent defendants well before initial appearance. By statute, "entitlement to the services of counsel begins as soon as feasible after the indigent is taken into custody or service is made upon him of the charge, petition, notice or other initiating process. Entitlement continues through any critical stage of the action or proceeding..." N.C. Gen. Stat. Ann. § 7A-451(b). Thus many States already provide even more than the Constitution demands.

Even in the States within the jurisdiction of the Fifth Circuit, the provision of counsel after initial arraignment is less the exception than the rule. The Louisiana Code of Criminal Procedure states: "The sheriff or law enforcement officer having custody of an arrested person shall bring him promptly, and in any case within seventy-two hours from the time of the arrest, before a judge for the purpose of

appointment of counsel....and a judge shall appoint counsel to represent the defendant within seventy-two hours from the time of arrest." La. Code Crim. P. art. 230.1. Mississippi, too, provides counsel to indigent defendants upon initial appearance. In *Jimpson v. State*, 532 So. 2d 985 (Miss. 1988), the Mississippi Supreme Court explained, "[t]he most recent formulation of when the right to counsel attaches under Mississippi law begins with *Cannaday v. State*, 455 So. 2d 713 (Miss. 1984), where the Court held that the right to counsel may attach as early as the issuance of a warrant.... More recently we have refined our view to hold that state law effects attachment of the right to counsel after arrest and at the point when the initial appearance 'ought to have been held.'" *Jimpson*, 532 So. 2d at 988 (internal citations omitted). The Encyclopedia of Mississippi Law further explains, "[o]rdinarily, the right [to counsel] attaches under state law once the accused has been taken into custody and at least functionally arrested... This may well be earlier than current federal constitutional jurisprudence recognizes that the Sixth Amendment right to counsel attaches. The *initial appearance* has become the benchmark for measuring *the latest moment when the right attaches.*" 3 James L. Robertson, *Encyclopedia of Mississippi Law* § 19:72 (Jeffrey Jackson & Mary Miller eds. 2007) (emphasis added; footnote omitted).

As the case law and statutory provisions cited in the appendix make clear, these examples are by no means anomalous. To the contrary, they reflect a shared understanding throughout the land about the

requirements of the Sixth Amendment and a broad commitment to the values that amendment protects.

In sum, while the Sixth Amendment question at the heart of this case has enormous implications for criminal defendants in the few States that do not provide access to counsel upon initial arraignment, *see infra* Part IV, a decision striking down the Fifth Circuit rule will not necessitate any significant reworking in criminal justice systems across the country. To the contrary, such a holding would merely work to bring the few outlier states in line with generally accepted procedures throughout the nation.

IV. The Practical Consequences Of Adopting The Fifth Circuit's "Prosecutorial Involvement" Test Would Be Severe.

The Fifth Circuit's novel prosecutorial involvement test not only is contrary to this Court's jurisprudence and the settled practice throughout the States, it would have drastic consequences for the defendants denied counsel, and also for the integrity and efficiency of our criminal justice system. As NACDL members can attest, the time period after initial arraignment is often critical to providing effective representation. A delay of months or even weeks in the defendant's access to counsel can be the difference between freedom and confinement and, in many cases, such delay will prevent access to counsel during the only time the evidence needed to support a meritorious defense can be gathered. Thus, defendants forced to wait weeks

and even months for appointed counsel are at a severe disadvantage against the power of the State.

1. A rule requiring prosecutorial involvement before the State must provide counsel to a defendant would severely limit an attorney's ability to investigate cases properly. Attorneys are under strict obligation to investigate their clients' cases in a timely and thorough manner. The American Bar Association Guidelines, for example, dictate that "[d]efense counsel should conduct a *prompt* investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case." ABA, *Criminal Justice Section Standards: Defense Section*, Standard 4-4.1: Duty to Investigate, *available at* http://www.abanet.org/crimjust/standards/dfunc_blk.html#4.1 (emphasis added); *see also* 1 *The Public Defender Service for the District of Columbia, Criminal Practice Institute: Criminal Practice Manual*, 2.1 (2006) ("The importance of thorough investigation cannot be over emphasized. Even the most skillful lawyer's effectiveness is undermined by inadequate knowledge of the facts."). The reason for the emphasis on "prompt" investigation is clear. There are a myriad of situations where delay of a few days — much less weeks or months — can render an investigation futile. As one practitioner has explained, "Every good investigator knows the importance of early investigation because witnesses can disappear, memories fade, and physical evidence is likely to be lost or destroyed." Mary Prosser, *Reforming Criminal Discovery: Why Old Objections Must Yield To New Realities*, 2006 Wis. L. Rev. 541,

598 (2006); *see also 1 Criminal Practice Institute: Criminal Practice Manual* at 2.1 ("It is counsel's obligation to find out as much as possible about every case, as soon as possible. Speed is essential. Physical evidence disappears, memories fade, and witnesses move away or are forgotten.").

One critical problem facing defense counsel is that witnesses are often transient. In many cases, it is not just the defendants, but the victims and witnesses that are indigent. Those victims and witnesses often have less stable and predictable lives: they move more often, and their work schedules or place of employment (if they are even employed) can change quickly. For example, if a homeless man is arrested for assault in a park, many of the witnesses are likely to be other homeless people who sleep in the park. If the accused does not have access to counsel for weeks or even months, effective investigation by his lawyer is all but impossible.[2] *See 1 Criminal Practice Institute: Criminal Practice Manual* at 2.14 (detailing the need to interview both government and defense witnesses).

Delayed investigations are also complicated by the fact that memories fade as time passes. Whereas the details of a typical drug crime, for instance, may

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[2] One NACDL member from Arkansas explains that he once visited a crime scene twenty nights in a row to search for witnesses vital to his client's case. He eventually came upon evidence that the government had failed to discover and that proved essential to his client's defense. If he had not gotten access to his client soon after the initial appearance, this key information would have been lost.

be fresh in a witness's mind just after the exchange, as time goes on, that witness becomes less able to identify the key players and to recall the timing of the sale. The attorney must quickly unearth these vital facts to ensure a robust defense. If a defendant is forced to wait weeks or months to obtain an attorney, that delay may mean the difference between a verdict of innocent or guilty if essential evidence is lost to the workings of time.

Physical evidence, too, is often compromised or lost if investigation does not occur promptly after the alleged crime. Crime scenes can change quickly. For example, if the view from a location is relevant to a witness's accurate recollection of a crime scene, the subsequent pruning of trees and shrubs, or other changes in the landscape, may make it impossible to obtain adequate understanding of the conditions at the time of the incident. Further, if an alleged crime occurred in a rented apartment, it can be essential for the attorney to investigate the placement of the furniture, the blood splatterings on the walls or floors, or even the contents of a refrigerator. If too much time passes between incident and investigation, spoliation of the crime scene inevitably occurs. *See 1 Criminal Practice Institute: Criminal Practice Manual* at 2.3 ("Personal inspection of the scene of the incident, preferably under conditions similar to those at the time of the alleged crime, is imperative. It is important to view the scene as soon as possible, because lighting, weather and structures may change quickly."). A relative may move the furniture, a landlord may repaint the walls, or a neighbor might clean the kitchen. In any of these

circumstances, the lawyer's ability to recover accurately essential evidence is lost. In short, a lawyer cannot be expected to perform the duties required of him — he cannot "explore all avenues leading to facts relevant to the merits of the case" — if he is denied access to his client until all of those avenues have become blocked.

2. The Fifth Circuit standard would not only make it difficult for a defendant's attorney to discover key evidence, it would also make it impossible for the attorney to ascertain key facts from the defendant himself following the alleged crime. *See* ABA, *Criminal Justice Section Standards: Defense Section*, Standard 4-3.2: Interviewing the Client ("As soon as practicable, defense counsel should seek to determine all relevant facts known to the accused."). Just as witnesses' memories fade, so do defendants' recollections of the events. If an attorney does not have access to his client until months after the incident, the defendant will be less likely to be able to recall accurately essential details of the event, or to provide the basis of an alibi defense.

For certain kinds of cases, it is imperative that the attorney have quick access to the defendant so that an account of the defendant's mental and physical state may be recorded. For example, in cases where the defendant is likely to assert an insanity defense, an attorney must be able to seek an evaluation of the defendant's mental state as close to the time of the crime as possible — before the defendant is treated by state personnel, and particularly where personality-altering medications

are administered. Without a defense record of the defendant's state near the time of the incident, it is much more difficult for the defendant to present a credible claim of insanity.

In other instances, the defense attorney will need to make a record of the physical state of the defendant, as in cases involving self-defense. If a defendant claims that he was provoked before attacking another individual, it is essential for the attorney to seek proper medical documentation of any wounds on his client's body. If an attorney does not meet his client until weeks or months after the incident, this documentation cannot be done. Again, an attorney can only effectively perform his investigative role if he is given prompt access to his client.

3. As this Court has recognized, "[e]ven the intelligent and educated layman has small and sometimes no skill in the science of law....He requires the guiding hand of counsel at every step in the proceedings against him." *Powell*, 287 U.S. at 69. Delayed access to a lawyer forces the defendant to navigate the procedural maze of the law without the assistance of trained counsel. For example, in Texas, if the State delays seeking an indictment, a defendant has the right to move for an examining trial. *See* Texas Code Crim. P. art. 16.01. An examining trial can result in discharge of the matter if the State's evidence does not meet the burden of proof.[3] On a more strategic level, the examining

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[3] Under Texas law, a defendant loses the right to an examining trial after indictment. *See* Tex. Code Crim. P. art. 16.01

trial is a procedural means of forcing the State either to act on a case or dismiss it. In many counties, a defense request for an examining trial often pushes the prosecutors to present their case to the grand jury and seek indictment. In these instances, the defendant avoids the perpetual state of uncertainty that a looming indictment produces. Indigent defendants cannot be expected to know these intricacies of the law.[4] And, they should not be punished merely because of their lack of funds. A defendant would almost certainly be unaware of this procedural intricacy without advice from counsel. Yet, even if the defendant were somehow informed of its existence, it is unlikely that the typical indigent defendant would be capable of attempting the "perilous endeavor," *see Halbert*, 545 U.S. at 621-22, of asserting this right without the assistance of counsel. As such, without that assistance, many

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(detailing that a defendant "shall have the right to an examining trial *before* indictment...") (emphasis added). Thus, if the defendant does not request an examining trial and is then indicted, he loses the chance to force the State to demonstrate that it meets its burden of proof. Defendants, then, may be indicted under questionable charges and may be unable to prove their innocence until well after indictment – forcing the matter closer to trial and causing the defendant, and the State as well, to endure the unnecessary burdens of a fruitless criminal accusation. *See infra*, Part IV.4.

[4] Under Texas Code Crim. P. art. 15.17, a defendant charged with a felony must be informed of his right to an examining trial at magistration. However, at no time does the State explain what an examining trial is or how the defendant may initiate it. Thus, without counsel, the defendant remains helpless to navigate these procedural workings on his own.

indigent defendants could face unnecessary and prolonged uncertainty.

Similar procedural hurdles exist throughout the country. In New York, for example, a person who is about to be criminally charged by the grand jury has the right to testify before it. *See* N.Y. Crim. P. art. 190.50(5)(a). He also has the right to "request the grand jury, either orally or in writing, to cause a person designated by him to be called as a witness in such proceeding." N.Y. Crim. P. art. 190.50(6). At the grand jury stage, a prosecutor may not initially be involved in the matter, as the grand jury in New York stands as a body separate from the District Attorney. Thus, under the Fifth Circuit rule, the accused may not have the right to appointed counsel at this time. However, to exercise successfully the rights delineated in article 190.50, the accused must know how to manage the procedural requirements dictated by the Rule — he must give written notice of his desire to make a presentation before the grand jury or give notice to the grand jury of his request for a witness to be called. An indigent individual, with no training in the formalities of the law, will be severely limited in his ability to exercise these rights.[5] Not infrequently a meaningful presentation to the grand jury, either by the defendant himself or by witnesses he designates, may result in lesser charges, or even no indictment at all. With serious liberties at stake, counsel is surely necessary to

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[5] New York law provides counsel to indigent individuals who are under investigation by the grand jury and who wish to appear as a witness, without regards to a prosecutor's involvement in the investigation. *See* N.Y. Crim. P. art. 190.52.

manage the procedural challenges our systems of justice create.

4. Finally, denying a defendant access to counsel until prosecutorial involvement will often result in a needless waste of the criminal justice system's resources. If an indigent defendant is not provided counsel until after formal indictment — often the stage at which a prosecutor becomes involved — cases that should never have proceeded to indictment will nonetheless clog the justice system. Mr. Rothgery's case provides a perfect example. The charges for which Mr. Rothgery was eventually indicted had no merit and could never have led to conviction, a fact his lawyer was able to confirm shortly after commencing work on the case. However, because Mr. Rothgery was denied legal representation for months, the State used precious resources, not the least of which was the jail space for the three-week period in which Mr. Rothgery was incarcerated, for a futile cause. *See* Pet. App. 16a-17a. Once counsel became involved, he easily showed that the charges were meritless, and Mr. Rothgery's case was dismissed. *Id.* at 17a.

Sound public policy encourages the quick and just resolution of litigation in many areas of the law, most notably through settlement in civil litigation and plea bargaining in criminal matters. *See e.g., McDermott, Inc. v. AmClyde*, 511 U.S. 202, 215 (1994) ("public policy wisely encourages settlements..."); *United States v. Mezzanatto*, 513 U.S. 196, 206 (1995) (noting policy in Federal Rules of "'promotion of disposition of criminal cases by compromise'" (quoting Advisory Committee Notes to

Fed. R. Evid. 410)). There is no reason why similar considerations do not apply here. By failing to provide counsel at a time where it would be most efficient for the prompt resolution of cases, the Fifth Circuit rule pushes criminal matters further towards trial — the most expensive and high-stakes stage in the criminal process.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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January 23, 2008

APPENDIX

Survey of Federal and State Rules Regarding Whether Counsel Is Provided to Indigent Defendants Before, At, Or Just After Initial Appearance

The following 45 jurisdictions — 43 States, the federal government, and the District of Columbia — provide counsel before, at, or just after initial appearance.

Federal	Fed. R. Crim. P. 5, 44
Alaska	Alaska Stat. § 18.85.100; Alaska R. Crim. P. 5
Arizona	16A Ariz. Rev. Stat., R. Crim. P. 4.2, 6.1
Arkansas	Ark. R. Crim. P. 8, 8.2; *Bradford v. State*, 927 S.W.2d 329 (Ark. 1996)
California	Cal. Penal Code §§ 858, 859; *In re Johnson*, 398 P.2d 420, 422-23 (Cal. 1965)
Connecticut	Conn. Gen. Stat. § 54-1b;. Conn. Super. Ct. R. §§ 37-1, 37-3, 37-6 ; *State v. Stenner*, 917 A.2d 28 (Conn. 2007)

Delaware	Del. Code tit. 29, §§ 4604, 5103; Del. R. Crim. P. 5, 44; *Markward v. State*, 1995 WL 496936 (Del. 1995); *Deputy v. State*, 500 A.2d 581 (Del. 1985)
District of Columbia	D.C. R. Crim. P. 5, 44
Florida	Fla. R. Crim. P. 3.111
Georgia	Ga. Code Ann. §§ 17-4-26, 17-12-23; *O'Kelley v. State*, 604 S.E.2d 509 (Ga. 2004)
Hawaii	Haw. Rev. Stat. §§ 802-1, 803-9
Idaho	Idaho Crim. R. 5, 44; Idaho Code § 19-852
Illinois	725 Ill. Comp. Stat. 5/109-1
Indiana	Ind. Code § 35-33-7-5, 35-33-7-6
Iowa	Iowa Code, Ct. R. §§ 2.2, 2.28
Kentucky	Ky. R. Crim. P. § 3.05
Louisiana	La. Code. Crim. P. art 230.1
Maine	Me. R. Crim. P. 5C

Maryland	Md. Code, Crim. Law, Art. 27A, § 4; Md. R. 4-214; *McCarter v. State*, 770 A.2d 195 (Md. 2001)
Massachusetts	Mass. R. Crim. P. 7
Michigan	Mich. Comp. Laws 6.005
Minnesota	Minn. R. Crim. P. 5.01, 5.02
Mississippi	*Jimpson v. State*, 532 So. 2d 985 (Miss. 1988); 3 James L. Robertson, *Encyclopedia of Mississippi Law* § 19:72 (Jeffrey Jackson & Mary Miller eds. 2007)
Missouri	Mo. Rev. Stat. § 600.048; 19 Williams A. Knox, *Mo. Prac., Crim. Prac. & P.* § 8:10 (3d ed. 2007)
Montana	Mont. Code § 46-8-101
Nebraska	Neb. Rev. Stat. § 29-3902
Nevada	Nev. Rev. Stat. 178.397
New Hampshire	N.H. Rev. Stat. 604-A:3
New Jersey	N.J. R. Crim. P. 3:4-2; *State v. Tucker*, 645 A.2d 111 (N.J. 1994)
New Mexico	N.M. Stat. § 31-16-3

New York	N.Y. Crim. P. Law § 180.10
North Carolina	N.C. Gen. Stat. § 7A-451
North Dakota	N.D. R. Crim. P. 5, 44
Ohio	Ohio R. Crim. P. 5, 44
Oregon	Or. Rev. Stat. §§ 135.010; 135.040; 135.050
Pennsylvania	Pa. R. Crim. P. 122 and Comments to the Rule; Pa. R. Crim. P. 519
Rhode Island	R.I. Dist. Ct. R. Crim. P. 5, 44
South Dakota	S.D. Crim. L. § 23A-40-6
Tennessee	Tenn. R. Crim. P. 44
Utah	Utah Code Ann. § 77-32-302
Vermont	Vt. Stat. Ann. tit. 13, § 5234; Vt. R. Crim. P. 5, 44
Washington	Wash. Super. Ct. Crim. R. 3.1
West Virginia	W.Va. Code § 50-4-3; *State v. Barrow*, 359 S.E.2d 844 (W. Va. 1987)
Wisconsin	Wis. Stat. § 967.06
Wyoming	Wyo. Stat. 1977 § 7-6-105; Wyo. R. Crim. P. 5, 44

In the following three jurisdictions, there is either disparity between the law as written and the law as practiced, or the statutory requirements are ambiguous. Nonetheless, NACDL members in some of the States reported that counsel is often provided, despite the ambiguities.

Kansas††	Kan. Stat. §§ 22-2901, 22-4503
Oklahoma‡‡	22 Okla. Stat. § 251
Virginia§§	Va. Code §§ 19.2-157, 19.2-158

†† Kan. Stat. § 22-4503 states that once a defendant is charged with a complaint by the State, he is entitled to appointed counsel. Kan. Stat. § 22-2901 suggests that a complaint must be filed at approximately the same time as an initial appearance before a magistrate following a warrantless arrest. Combined, these statutes suggest that Kansas provides counsel to indigent defendants upon initial appearance. However, *State v. Waugh*, 712 P.2d 1243, 1250 (Kan. 1986), suggests that in some instances, a defendant will appear before a magistrate for initial appearance before a complaint is filed. Erring on the side of caution, we have deemed Kansas's law unclear.

‡‡ Under 22 Okla. Stat. § 251, a defendant is informed at initial appearance of his right to counsel. However, it is not clear from the statute whether counsel is actually appointed directly following the appearance. Further, according to an NACDL member, if a defendant is released on bond following initial appearance, he may wait for a period of time for counsel because the judge must determine whether he meets the requirements of indigency. In practice, this determination can result in delayed provision of counsel. For these reasons, we have deemed Oklahoma's law and practice ambiguous.

§§ An NACDL member in Virginia reports that the State appoints counsel upon initial appearance. Further, § 19.2-157

In the following four jurisdictions, it appears that counsel is not currently provided in all instances upon initial appearance.

Alabama***	Ala. R. Ct. 6.1; Ala. R. Crim. P. 4.4; *Ex Parte Stewart*, 853 So. 2d 901 (Ala. 2002)
Colorado†††	Colo. Rev. Stat. §§ 16-7-207, 16-7-301; Colo. R. Crim. P. 5; 14 Robert J. Dieter, *Colo. Prac., Crim. Prac. & P.* § 1.9 (2d ed. 2007); *People v. Anderson*, 842 P.2d 621 (Colo. 1992)

---

details that whenever an eligible person "appears before *any court* without being represented by counsel, the court shall inform him of his right to counsel" and "if appropriate, the statement of indigence...may be executed." While these sources strongly suggest that Virginia does, in fact, provide counsel upon initial appearance, the precise timing of appointment is not perfectly clear on the face of the statute, and we have therefore deemed the State's practice to be unclear.

*** An NACDL member in Alabama reports that, notwithstanding the authorities noted here, the State appoints counsel immediately following initial appearance. He explains that counsel then appears at the preliminary hearing, at which point a probable cause determination is made.

††† Colorado law makes a distinction for the provision of counsel between felonies and misdemeanors. *See* Colo. Rev. Stat. § 16-7-207. For felonies, defendants are entitled to make an application for counsel at initial appearance. The statute does

South Carolina##	S.C. App. Ct. R. 602
Texas§§§	Tex. Code. Crim. P. art. 1.051

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not make entirely clear, however, at what point counsel is actually assigned. And, according to an NACDL member, if felony defendants are released from jail, they have the obligation to go in person to the public defenders' office to apply for counsel. For misdemeanors, under Col. Rev. Stat. § 16-7-207 and § 16-7-301, the court cannot assign counsel until after the prosecutor has spoken with the defendant to discuss a potential plea. Though the defendant is not obligated to reveal information to the prosecutor, "application for appointment of counsel and the payment of the application fee shall be deferred until after the prosecuting attorney has spoken with the defendant..." *Id.* § 16-7-301. This rule, then, is even harsher than the Fifth Circuit "prosecutorial involvement" test because it allows direct prosecutorial interaction with the defendant before any assignment of counsel can be made.

South Carolina law is currently in flux. Rule 602 suggests that counsel is provided following initial appearance. However, according to an NACDL member in South Carolina, the State is creating "differentiated case management" in each county. *See* Sept. 19, 2007 Order Re: Bond Hearing Procedures in Summary Courts, Supreme Court of South Carolina, *at* http://www.sccourts.org/courtOrders/displayOrder.cfm?orderNo=2007-09-19-01. As a result, we cannot characterize with precision the practice in South Carolina.

§§§ Since the passage of the 2001 Fair Defense Act, Texas does provide counsel following arrest and initial appearance for persons held in custody. For those released on bond, however, counsel is appointed either at arraignment on the information or indictment, or when adversarial judicial proceedings commence – whichever occurs first. Thus, the appointment of counsel for those charged and released on bail depends on when the Constitution requires the attachment of the right to counsel.

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No. 07-440

In the Supreme Court of the United States

WALTER ALLEN ROTHGERY,
Petitioner,

v.

GILLESPIE COUNTY, TX,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

BRIEF OF THE STATES OF TEXAS, ALABAMA, COLORADO, HAWAII, IOWA, MAINE, MISSISSIPPI, MONTANA, NEVADA, NEW HAMPSHIRE, OKLAHOMA, OREGON, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, AND UTAH, VIRGINIA AND OF PUERTO RICO AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Did the Fifth Circuit correctly hold that the Sixth Amendment right to counsel did not attach at Petitioner's Article 15.17 magistration because the State of Texas had not yet committed itself to prosecute Petitioner and, therefore, adversary judicial proceedings had not yet commenced?

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INTEREST OF *AMICI CURIAE*

Amici, the State of Texas and 17 other States and Puerto Rico, have an interest in ensuring that their courts make appointments of counsel when required to do so by the Sixth Amendment to the United States Constitution. The *amici* States also have an interest in ensuring that their courts are not compelled to appoint counsel when the Sixth Amendment does not require appointment, so as to avoid frustrating the criminal investigatory process and the unnecessary expenditure of the States' resources. Given the significance of the Sixth Amendment right to counsel, the States have a substantial interest in ensuring that it is accorded its proper scope.

SUMMARY OF ARGUMENT

The Sixth Amendment right to counsel, by its terms, protects the "accused" in "[a]ll criminal prosecutions." Thus, it guards against unfair trials, and against the possibility that a person unfamiliar with the law could be forced to defend himself in court against learned adversaries from the State. And, even earlier, it applies to critical stages of the prosecution to ensure that the accused's rights at trial are not unfairly prejudiced by uncounseled conduct pretrial.

The desideratum of the right to counsel is not safeguarding the liberty interests of the accused pretrial, nor is it effectuating speedy trials or providing a vigorous pretrial investigator. Instead, the object of the Sixth Amendment right to counsel is, singularly, preventing an unfair criminal prosecution.

Accordingly, the Sixth Amendment right to counsel does not arise until the government commits itself to prosecute the individual. And even then, the right has no application outside the critical stages in the

prosecution—those that might impact the ultimate outcome at trial.

The Court has long explained that the "purpose of the constitutional guaranty of a right to counsel is to protect an accused from conviction resulting from his own ignorance of his legal and constitutional rights . . . ." *Johnson* v. *Zerbst*, 304 U.S. 458, 465 (1938). Therefore, a person's "right to counsel attaches *only at or after* the time that adversary judicial proceedings have been initiated against him." *Kirby* v. *Illinois*, 406 U.S. 682, 688 (1972) (emphasis added). The focus is on the initiation of adversary proceedings because "it is only then that the government has committed itself to prosecute, and only then that the adverse positions of government and defendant have solidified." *Id.*, at 689. "It is this point, therefore, that marks the commencement of the 'criminal prosecutions' to which alone the explicit guarantees of the Sixth Amendment are applicable." *Id.*, at 690.

The initial question facing the Court in this case is whether adversary judicial proceedings had commenced against Petitioner, that is, whether the State of Texas had committed itself to prosecute Petitioner at the time of his Article 15.17 magistration. *See* TEX. CODE CRIM. PROC. art. 15.17. By any measure, the answer to that question is no.

In Texas only a prosecutor can commit the State to prosecute a felony offense. Because there is no evidence that any prosecutor had knowledge of or any involvement in the matter at the time Petitioner appeared before a justice of the peace and received his statutory warnings under Article 15.17 of the Texas Code of Criminal

Procedure, Petitioner's right to counsel did not attach at that time.

Petitioner asserts that two cases decided by the Court, *Brewer* v. *Williams*, 430 U.S. 387 (1977), and *Michigan* v. *Jackson*, 475 U.S. 625 (1986), establish that adversary judicial proceedings were initiated though the probable-cause determination, statutory warnings, and setting of bail at the Article 15.17 magistration. Petitioner's reliance on these two cases is misplaced. In each case, the Court looked to language from *Kirby* that an "arraignment" is one of the ways in which judicial proceedings may be commenced. Because, in both *Brewer* and *Jackson*, the defendants had been "arraigned," the Court did not dwell on the question further, and instead moved on to the question of waiver. Here, there is no dispute that, under Texas law, Petitioner had not yet been arraigned, and Petitioner's argument that his Article 15.17 magistration should be treated as the functional equivalent of a formal arraignment is belied by the administrative nature of the proceeding, the lack of adversarial questioning (or even a prosecutorial adversary), and the absence of a plea or any other inquiry that could prejudice any subsequent trial.

In the alternative, even if the right to counsel had attached at the Article 15.17 magistration, the Court should hold that Petitioner's right to counsel was not violated because he was never exposed to a critical stage in his prosecution without the assistance of counsel. Petitioner concedes that he was not entitled to counsel at the Article 15.17 magistration itself, and he suggests no other event at which his constitutional interest in a fair trial might have been implicated. That omission is fatal

to his claim. Therefore, the judgment of the Fifth Circuit should be affirmed.

ARGUMENT

I. ROTHGERY'S RIGHT TO COUNSEL DID NOT ATTACH FOLLOWING HIS ARTICLE 15.17 MAGISTRATION BEFORE A JUSTICE OF THE PEACE.

The Sixth Amendment right to counsel, which exists to protect an accused from unfair conviction as a result of his ignorance of the law, does not attach until adversary judicial proceedings have been initiated, that is, until the government has made a commitment to prosecute. Under Texas law, the State could not commit to prosecute Petitioner for a felony without the involvement of a prosecutor. Given the absence of prosecutorial knowledge or involvement in the matter at the time of the Article 15.17 magistration, the Fifth Circuit correctly held that the State of Texas had not yet committed to prosecute Petitioner and, therefore, no Sixth Amendment right to counsel had attached.

A. The Sixth Amendment Right to Counsel Exists to Protect an Accused from Conviction Resulting from Ignorance of His Legal and Constitutional Rights.

"The Sixth Amendment guarantees that '[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.'" *United States* v. *Gouveia*, 467 U.S. 180, 187 (1984). In *Johnson* v. *Zerbst*, the Court explained that this guarantee exists to protect the interests of the accused—who are not familiar with the law—in receiving a fair trial:

> "[The Sixth Amendment] embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is represented by experienced and learned counsel . . . . The '* * * right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with a crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defence, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him.'" 304 U.S. 458, 462-463 (1938) (quoting *Powell* v. *Alabama*, 287 U.S. 45, 68-69 (1932)).

Without this "guiding hand of counsel," although an individual "be not guilty, he faces the danger of conviction because he does not know how to establish his innocence." *Powell*, 287 U.S., at 69.

The Court has "recognized that the 'core purpose' of the counsel guarantee is to assure aid at trial, 'when the accused [is] confronted with both the intricacies of the law and the advocacy of the public prosecutor.'" *Gouveia*, 467

U.S., at 188-189 (quoting *United States* v. *Ash*, 413 U.S. 300, 309 (1973)). The Court has also extended the right to counsel to "'critical' pretrial proceedings . . . recognizing that at those proceedings, the accused [is] confronted, just as at trial, by the procedural system, or by his expert adversary, or by both, . . . in a situation where the results of the confrontation 'might well settle the accused's fate and reduce the trial itself to a mere formality.'" *Gouveia*, 467 U.S., at 189 (quoting *Ash*, 413 U.S., at 310 and *United States* v. *Wade*, 388 U.S. 218, 224 (1967)). Thus, "[t]he purpose of the constitutional guaranty of a right to counsel is to protect an accused from conviction resulting from his own ignorance of his legal and constitutional rights . . . ." *Johnson*, 304 U.S., at 465. The Court has repeatedly reaffirmed that purpose.[1]

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1. Numerous Court decisions have reaffirmed the principle that the Sixth Amendment right to counsel exists to protect an individual from ultimately being wrongfully convicted as a result of his inadequate knowledge of the law. For example, in *Moran* v. *Burbine* the Court observed as follows:

> "[The Sixth Amendment's purpose] is to assure that in any criminal prosecutio[n] . . . the accused shall not be left to his own devices in facing the prosecutorial forces of organized society . . . By its very terms, it becomes applicable only when the government's role shifts from investigative to accusation. For it is only then that the assistance of one versed in the intricacies of the law . . . is needed to assure that the prosecution's case encounters the crucible of meaningful adversarial testing." 475 U.S. 412, 430 (1986) (internal quotations omitted).

See also Evitts v. *Lucey*, 469 U.S. 387, 394 n.6 (1985) ("Our cases dealing with the right to counsel—whether at trial or on appeal—have

Notwithstanding the long-recognized purpose of the Sixth Amendment in preventing an unfair trial, the *amici* law professors argue that the Sixth Amendment is instead intended to protect against any substantial deprivation of liberty before trial. In their *amicus* brief, the professors note that once counsel was appointed for Petitioner, the charges against him were dropped, but not before he spent "weeks in jail." *Amicus* Br. of Twenty-Four Professors of Law, at 2. The professors suggest that this case therefore "presents the Court with an opportunity to prevent such injustices in the future by clarifying its rule regarding when the Sixth Amendment right to counsel attaches" and urge the Court to adopt a rule that would not necessarily require appointment of counsel for a *Gerstein* hearing, but would require appointment of counsel "once the hearing is complete if the result is to impose an ongoing, significant restriction on the accused's liberty." *Id.*, at 2-4.

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often focused on the defendant's need for an attorney to meet the adversary presentation of the prosecutor . . . . Such cases emphasize the defendant's need for counsel in order to obtain a *favorable* decision.") (internal citation omitted, italics original); *Gouveia*, 467 U.S., at 190 ("[T]he right to counsel exists to protect the accused during trial-type confrontations with the prosecutor . . . ."); *Strickland* v. *Washington*, 466 U.S. 668, 684 (1984) ("In a long line of cases . . . this Court has recognized that the Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial.") (internal citations omitted); *United States* v. *Cronic*, 466 U.S. 648, 653-54 (1984) ("An accused's right to be represented by counsel is a fundamental component of our criminal justice system . . . . Without counsel, the right to a trial itself would be of little avail . . . .") (internal quotation omitted); *Gideon* v. *Wainwright*, 372 U.S. 335, 344 (1963) ("[I]n our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."). *Johnson*, 304 U.S., at 458.

The professors' contention that the right to counsel exists to protect against pretrial deprivations of liberty is contrary to the repeated holdings of this Court discussed above and, indeed, was squarely rejected by the Court in *Gouveia*.

In *Gouveia*, four inmates were convicted of murdering another inmate at a federal prison and two other inmates were convicted of another murder at the same facility. 467 U.S., at 182. The individuals were placed in administrative detention for extended periods of time (approximately nineteen months in one case and not less than seven months in the other) before counsel was eventually appointed. *Id.*, at 182-84. On appeal, the Ninth Circuit, sitting en banc, decided that the inmates had a Sixth Amendment right to an attorney while they were held in administrative detention prior to indictment. *Id.*, at 182. The Court "granted certiorari to review the Court of Appeal's novel application of our Sixth Amendment precedents," *id.*, and squarely rejected any argument that the Sixth Amendment right to counsel exists to protect an accused's liberty interests before trial:

> "The Court of Appeals departed from our consistent interpretation of the Sixth Amendment in these cases, and in so doing, fundamentally misconceived the nature of the right to counsel guarantee. We agree with the dissent that the majority's analogy to Sixth Amendment speedy trial cases is inapt. . . . The difference is readily explainable, given the fact that the speedy trial right and the right to counsel protect different interests. *While the right to counsel exists to protect the accused during trial-type confrontations with the prosecutor, the speedy trial*

> *right exists primarily to protect an individual's liberty interest,* 'to minimize the possibility of lengthy incarceration prior to trial, to reduce the lesser, but nevertheless substantial, impairment of liberty imposed on an accused while released on bail, and to shorten the disruption of life caused by arrest and the presence of unresolved criminal charges.'" *Id.*, at 189-90 (quoting *United States* v. *MacDonald*, 456 U.S. 1, 6-7, 8 (1982)) (internal citations omitted) (emphasis added).

Thus, as *Gouveia* expressly held, the Sixth Amendment right to counsel exists not to protect against pretrial deprivations of liberty (other constitutional provisions such as the speedy trial right and due process address that concern), but rather serves an altogether different function: protecting an accused from unfair conviction as a result of ignorance of his legal and constitutional rights.

B. Consistent With Its Underlying Purpose, the Sixth Amendment Right to Counsel Attaches Only at or After the Initiation of Adversary Judicial Proceedings.

Given that the Sixth Amendment right to counsel exists to prevent the conviction of an accused as a result of his ignorance of his legal and constitutional rights, the question inevitably follows when counsel is necessary to protect this interest. The Court answered the question in *Kirby*, holding that an individual's "right to counsel attaches only *at or after* the time that adversary judicial proceedings have been initiated against him." 406 U.S., at 688 (emphasis added). This test begets yet another question: when adversary judicial proceedings commence.

As explained below, the answer depends upon when the government commits itself to prosecuting an individual.

C. The Fifth Circuit Correctly Held That Petitioner's Sixth Amendment Right to Counsel Did Not Attach at the Article 15.17 Magistration Because the State of Texas Was Not Committed to Prosecuting Petitioner.

1. The Government's Commitment to Prosecute Is a Necessary Element for the Initiation of Adversary Judicial Proceedings.

In *Gouveia*, the Court recognized that the "view that the right to counsel does not attach until the initiation of adversary judicial proceedings" is "consistent not only with the literal language of the Amendment, which requires the existence of both a 'criminal prosecutio[n]' and an 'accused,' but also with the purposes which we have recognized that the right to counsel serves" including the "core purpose" of assuring "aid at trial 'when the accused [is] confronted with both the intricacies of the law and the advocacy of the public prosecutor.'" 467 U.S., at 188-89 (quoting *Ash*, 413 U.S., at 309).

Bearing that purpose in mind, the Court explained that when considering whether adversary judicial proceedings have begun and, accordingly, whether the right to counsel has attached, the determinative factor is the government's commitment to prosecute:

> "Thus, given the plain language of the Amendment and its purpose of protecting the unaided layman at critical confrontations with his adversary, our conclusion that the right to counsel attaches at the

> initiation of adversary judicial proceedings 'is far from a mere formalism' . . . . *It is only at that time 'that the government has committed itself to prosecute, and only then that the adverse positions of government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law.'*" *Gouveia*, 467 U.S., at 189 (quoting *Kirby*, 406 U.S., at 689) (emphasis added).

"It is this point, therefore, that marks the commencement of the 'criminal prosecutions' to which alone the explicit guarantees of the Sixth Amendment are applicable." *Kirby*, 406 U.S., at 689-90.

The critical nature of the commitment to prosecute in determining whether the Sixth Amendment right to counsel has attached has been acknowledged by a number of the circuit courts. *See United States* v. *Hylton*, 349 F.3d 781, 787 (CA4 2003) (finding that "the statement of charges . . . did not commence formal prosecutorial proceedings to which the Sixth Amendment right of counsel attached"); *United States* v. *Alvarado*, 440 F.3d 191, 199-200 (CA4 2006) (noting that the "filing of a federal criminal complaint does not commence a formal prosecution" in concluding that the Sixth Amendment right to counsel did not attach upon the filing of the complaint); *Caver* v. *Alabama*, 577 F.2d 1188, 1195 (CA5 1978) ("[T]he relevant time is when 'the government has committed itself to prosecute' and 'a defendant finds himself faced with the prosecutorial forces of organized society'") (quoting *Kirby*, 406 U.S., at 689); *United States*

v. *McCauliffe*, 490 F.3d 526, 539 (CA6 2007) (noting that the Sixth Amendment right to counsel "does not attach until a prosecution is commenced . . .") (quoting *United States* v. *Cope*, 312 F.3d 757, 772 (CA6 2002); *United States* v. *Muick*, 167 F.3d 1162, 1165 (CA7 1999) ("When Muick's attorney requested that he be involved in all contact between Muick and the Customs agents, Muick had not yet been indicted. As there was no prosecution at that time, Muick's Sixth Amendment rights could not yet be invoked."); *Anderson* v. *Alameida*, 397 F.3d 1175, 1180 (CA9 2005) (holding the state court "reasonably concluded" petitioner's trial counsel's performance was sufficient even though trial counsel did not assert a Sixth Amendment claim because, the state court found, such a claim was "without merit" since a police investigator's filing of a complaint for an arrest warrant did not commit the district attorney to prosecute or, "[i]n other words, filing the complaint for an arrest warrant was not a prosecutorial act . . ." and therefore "a police inspector filing a complaint seeking an arrest warrant is not a critical stage that commits a prosecutor to trial"); *Lumley* v. *City of Dade City*, 327 F.3d 1186, 1195 (CA11 2003) ("[T]he Sixth Amendment right to counsel ordinarily does not arise until there is a formal commitment by the government to prosecute . . . .").

2. Federal Courts Look to State Law When Determining When Adversary Judicial Proceedings Began in State Court.

As noted by Petitioner, state criminal proceedings vary widely. Pet. Br., at 16. The event that commences adversary judicial proceedings may occur, for example, "by way of formal charge, preliminary hearing, indictment,

information, or arraignment." *Kirby*, 406 U.S., at 688-89. As such, federal courts look to state law to determine when adversary judicial proceedings begin. *See Moore* v. *Illinois*, 434 U.S. 220, 228 (1977) (noting that the "prosecution in this case was commenced under Illinois law when the victim's complaint was filed in court" in arriving at its decision that his rights had attached at the time of the preliminary hearing); *Meadows* v. *Kuhlmann*, 812 F.2d 72, 77 (CA2 1987) (looking to New York law to determine when the prosecution commenced); *Beck* v. *Bowersox*, 362 F.3d 1095, 1101 (CA8 2004) (same as to Missouri); *Anderson* v. *Alameida*, 397 F.3d, at 1180 (same as to California). Therefore, Texas criminal procedure controls whether the government had committed itself to prosecute Petitioner, thus commencing adversary judicial proceedings and triggering the Sixth Amendment right to counsel.

3. The Fifth Circuit Correctly Held That, at the Time of the Article 15.17 Magistration, the State of Texas Had Not Committed Itself to Prosecute Petitioner and, Therefore, No Adversary Judicial Proceedings Had Begun.

Petitioner does not contend that adversary judicial proceedings commenced upon his arrest or his being booked into the Gillespie County Jail. Nor does Petitioner contend that he was entitled to a lawyer at the Article 15.17 magistration itself. Pet. Br., at 19-20 n.6. Rather, Petitioner ambiguously contends that his Sixth Amendment right to counsel attached some time "following" his Article 15.17 magistration before the

justice of the peace. Pet. Br., at 14.[2] However, because there was no commitment to prosecute at that time, adversary judicial proceedings had not been initiated and Petitioner's right to counsel had not attached.

Petitioner summarizes the proceedings at his Article 15.17 magistration as follows:

> "At Rothgery's initial appearance, the magistrate was presented with a sworn 'Affidavit of Probable Cause,' executed by the police officer who arrested Rothgery 'in the name and by the authority of the state of Texas,' 'charg[ing] that . . . Rothgery . . . commit[ted] the offense of unlawful possession of a firearm by a felon.' Pet. App. 33a. Based on the affidavit, the magistrate informed Rothgery that he was 'accused of the criminal offense of unlawful possession of a firearm by felon.' *Id.* at 35a. He also informed Rothgery of his right to appointed counsel and his right to an examining trial. *Id.* Finally, he set bail of $5,000 to ensure that Rothgery answered the accusation against him." Pet. Br., at 28.

Nothing in Petitioner's Brief establishes that the State of Texas was committed to prosecuting Petitioner as of the date of his Article 15.17 magistration. At best, Petitioner

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2. *See also* Fifth Circuit Record, at 343 (hereinafter "R. __"); Pet. Br., at 19-20 n.6 ("The question presented by this case . . . is the former: whether Rothgery's initial appearance before the magistrate marked the commencement of adversary judicial proceedings, *after* which his right to counsel attached.") (emphasis added). It is not clear how long "after" the initial appearance counsel must be appointed under Petitioner's interpretation of the Sixth Amendment.

has established only that he had been accused by a *peace officer* of committing a felony. However, as noted by the court of appeals, a peace officer has no legal authority to commit the State of Texas to prosecute Petitioner, and there is no evidence that any person with the authority to do so, that is, a prosecutor, had become involved in the matter at that time:

> "It is undisputed in this appeal that the relevant prosecutors were not aware of or involved in Rothgery's arrest or appearance before the magistrate on July 16, 2002. There is also no indication that the officer who filed the probable cause affidavit at Rothgery's appearance had any power to commit the state to prosecute without the knowledge or involvement of a prosecutor. *Compare* TEX. CODE CRIM. PROC. art. 2.13 (limiting the role of a police officer, in relevant part, to notifying the magistrate of an offense and arresting offenders), *with id.* arts. 2.01-.02 (designating district and county attorneys as the representatives of the state in all criminal cases and proceedings); *cf. Clawson* v. *Wharton County*, 941 S.W.2d 267, 272 (Tex. App.–Corpus Christi 1996, writ denied) (recognizing that 'the decision not to prosecute is the quintessential function of a prosecutor' (dash omitted))." *Rothgery* v. *Gillespie County*, 491 F.3d 293, 297 (CA5 2007).[3]

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3. *See also id.*, at 300-01 ("[T]he summary judgment evidence reflects no prosecutorial knowledge of or involvement in the arrest and magistrate appearance . . . .").

The Fifth Circuit correctly held that, given the absence of evidence of prosecutorial knowledge or involvement, the State of Texas had not commenced adversary judicial proceedings against Petitioner at the time of the Article 15.17 magistration and, therefore, Petitioner's Sixth Amendment right to counsel did not attach.[4]

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4. In a letter brief to the Fifth Circuit, filed at the invitation of the court, the Texas Office of the Attorney General submitted that the Texas "Court of Criminal Appeals has consistently correlated the initiation of adversary criminal proceedings with the involvement of a prosecutor. And for good reason, because only a prosecutor, not a peace officer, can commit the State to prosecute a felony offense." *See* April 20, 2007, Letter Brief at 11. The letter brief did note that in *Fuller* v. *State* the Texas Court of Criminal Appeals found that the right to counsel had attached at "the article 15.17 hearing." *Id.*, at 4 & n.10. However, *Fuller* is not dispositive on the issue of whether the Texas Court of Criminal Appeals would find that Petitioner's Article 15.17 magistration initiated adversary judicial proceedings for three reasons. First, in *Fuller*, the accused had already been charged with an offense. *See Fuller* v. *State*, 829 S.W.2d 191, 205 (Tex. Crim. App. 1992) (en banc). In contrast, Petitioner had not been formally charged by the time of his Article 15.17 magistration. *See Rothgery*, 491 F.3d at 300 (noting that a form used to memorialize the warnings given to Petitioner "indicated that charges 'will be filed' in the district court, not that they were being filed concurrently with the magistrate" and that "there is no basis to conclude that the use of the word 'charge' [in the probable-cause affidavit] was, or could have been anything but informal."); *see also* R. 343. Second, the *Fuller* court stopped short of making a final determination on this issue, finding only that the defendant "is *probably* right to insist that an effective waiver of counsel under the Sixth Amendment was essential to the admissibility of his ensuing statements," 829 S.W.2d, at 205 (emphasis added), but holding that the statements were nevertheless admissible because he had effectively relinquished or abandoned the right to counsel, *id.* Third, and most importantly, in a case decided nearly two years after the *Fuller* decision, the Texas Court of Criminal Appeals stated that it had "made it clear that an arrest alone does not trigger adversarial

The Fifth Circuit's decision is wholly consistent with the purpose and intent of the Sixth Amendment to protect the criminal defendant from the danger of erroneous conviction as a result of his ignorance of the law. Nothing happened prior to or during the Article 15.17 magistration that could fairly be considered an event that "could settle [Petitioner's] fate and reduce the trial itself to a mere formality," *Gouveia*, 467 U.S., at 189—and indeed Petitioner does not even attempt to make such an argument. The Fifth Circuit correctly affirmed the district court's order granting summary judgment to Gillespie County.

II. *BREWER* AND *JACKSON* ARE NOT DISPOSITIVE OF WHETHER ROTHGERY'S SIXTH AMENDMENT RIGHT TO COUNSEL ATTACHED AT THE ARTICLE 15.17 MAGISTRATION.

Petitioner erroneously contends that the question presented in this case—whether Petitioner's Sixth Amendment right to counsel attached following the Article 15.17 magistration, given the absence of a commitment by the government to prosecute Petitioner—was actually "settled" years ago by the Court in *Brewer* and *Jackson*. But *whether* the right to counsel had attached was not at issue in either of those cases. Hence, *Brewer* and *Jackson* do not control the outcome of this case.

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judicial proceedings, with or without a warrant, *nor does an Article 15.17 warning. . . .*" *Green* v. *State*, 872 S.W.2d 717, 720 (Tex. Crim. App. 1994) (en banc) (emphasis added) (noting that in a different case adversarial judicial proceedings were found to have "begun by the time of Article 15.17 warnings because by then unspecified 'charges' had been filed against defendant").

In both *Brewer* and *Jackson* the Court considered whether the defendants—whose Sixth Amendment right to counsel had "no doubt" attached, *Brewer*, 430 U.S., at 399—had waived their rights to be interrogated by the police. *See also Jackson*, 475 U.S., at 629 ("The question is not whether respondents had a right to counsel at their postarraignment custodial interrogations. The existence of that right is clear . . . . The question in these cases is whether respondents validly waived their right to counsel at the postarraignment custodial interrogation.").

In *Brewer*, an arrest warrant had been issued for the defendant, he had been arraigned, and committed to jail prior to making incriminating statements. 430 U.S., at 390-93, 399. Similarly, the defendants in *Jackson* had been arrested, arraigned, and apparently retained in police custody prior to the custodial interrogation at issue. 475 U.S., at 627-28. With little analysis, and with the simple observation that the defendants had each been "arraigned," the Court quickly concluded that the right to counsel had attached for each defendant (indeed, as to all defendants but one, the State conceded that it had) and moved on to the question of waiver. *Jackson*, 475 U.S., at 627-28; *Brewer*, 430 U.S., at 399.

Nonetheless, Petitioner contends that these cases establish that a person who is arrested and taken before a judge to hear the accusations against him and is then required to remain in jail or post bail is entitled to the protection of the Sixth Amendment. Pet. Br., at 21-24. Petitioner asserts that in *Jackson* the Court held that an individual's right to counsel attaches the moment that a person who was previously a "suspect" becomes an "accused." Pet. Br., at 3. Attempting to draw similarities

between the facts of his case and those in *Brewer* and *Jackson*, Petitioner claims that he falls into the category of "accused" because he was "accused" of a criminal offense at the Article 15.17 magistration and remanded to bail. Pet. Br., at 11-12.

Brewer and *Jackson* did not hold that a person in Petitioner's circumstances, that is, a person accused by a peace officer of committing an offense for purposes of establishing probable cause, would be an "accused." Rather the Court recognized in *Jackson* that a person is transformed from a "suspect" to an "accused" "*after a formal accusation has been made.*" *Jackson*, 475 U.S., at 632 (emphasis added); *see also id.*, at 631 ("In *United States* v. *Gouveia*, we explained the significance of the *formal accusation*, and the corresponding attachment of the Sixth Amendment right to counsel . . . .") (emphasis added); *id.* at 632 ("As a result, the 'Sixth Amendment guarantees the accused, at least after the initiation of *formal charges*, the right to rely on counsel . . . .") (emphasis added). As noted, *supra* note 4, formal charges had not been filed at the time of Petitioner's Article 15.17 magistration. And as has been explained, only a prosecutor can commit the State of Texas to prosecute a felony offense, and at the time of Petitioner's Article 15.17 magistration, there is no dispute that that had not happened yet.

Nor did *Brewer* and *Jackson* address the significance of the defendants' appearances before a judge or the setting of bail. The Court did not linger on the varying types of hearings that might conceivably be called "arraignments," and the Court made no comment on whether there had been prosecutorial involvement in any of the cases.

Rather, it appears that the Court was satisfied that the defendants' "arraignment" indicated the initiation of adversary judicial proceedings because an "arraignment" is one of the events expressly identified in *Kirby* as triggering the Sixth Amendment right to counsel. *Jackson*, 475 U.S., at 629 ("The arraignment signals 'the initiation of adversary judicial proceedings' and thus the attachment of the Sixth Amendment . . . .") (quoting *Gouveia*, 467 U.S., at 187) and 630 n.3 (citing *Kirby*, 406 U.S., at 689 and twice emphasizing "arraignment"); *Brewer*, 430 U.S., at 399.

Brewer and *Jackson* did not—contrary to Petitioner's assertions—hold that appearance before a justice of the peace for statutory warnings and the setting of bail necessarily invokes the Sixth Amendment right to counsel in every instance. Instead, both opinions, in but a few passing sentences, deemed it obvious that a formal "arraignment" commenced adversary proceedings.

But if an "arraignment" is to be accorded talismanic force, then it bears emphasis that, under Texas law, it is indisputable that Petitioner had yet not been arraigned. By statute, an "arraignment" under Texas law "takes place for the purpose of fixing [the defendant's] identity and hearing his plea." TEX. CODE CRIM. PROC. art. 26.02. Moreover, the arraignment in Texas typically takes place after the indictment. *Id.* art. 26.03. In contrast, an Article 15.17 magistration takes place before indictment and requires no entry of a plea. It bears none of the qualities of an arraignment under Texas law.

Black's Law Dictionary defines "arraignment" as,

> "[t]he initial step in a criminal prosecution whereby the defendant is brought before the court to hear the charges *and to enter a plea*." BLACK'S LAW DICTIONARY 104 (7th ed. 1999) (emphasis added).

That is surely the primary definition of the word. Petitioner urges that "arraignment" can also be used in some States to refer to proceedings that resemble an Article 15.17 magistration, Pet. Br., at 20-21 & n.7, but it is noteworthy that the Black's definition makes no such mention. Indeed, it expressly contrasts "arraignment" with "preliminary hearing" and "initial appearance," using a "cf." signal to reflect the difference between the terms. BLACK'S LAW DICTIONARY, at 104.

And Texas law does not equate an Article 15.17 magistration with an arraignment. Indeed, several differences are evident. *First*, as detailed in Respondent's brief, the Texas proceeding is essentially administrative, providing the arrestee with various forms and statutory warnings. *See* Resp. Br., at 4-7.[5] *Second*, an Article 15.17 magistration is non-adversarial. Indeed, unlike an arraignment, the prosecutor is typically not even there (and, in this case, was both absent and unaware of the proceeding). And *third*, Petitioner entered no plea (nor could he) and was required to preserve no defenses that could prejudice him at later trial.

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5. Although the magistrate's determination of probable cause is not itself administrative, this Court has expressly held that a probable-cause hearing does not require the appointment of counsel under the Sixth Amendment. *Gerstein* v. *Pugh*, 420 U.S. 103, 122 (1975).

Petitioner avoids these obvious distinctions by asserting that his Article 15.17 magistration was "functionally identical to the proceedings in *Brewer* and *Jackson*." Pet. Br., at 27. As an initial matter, the precise contours of the proceedings in *Brewer* and *Jackson* are ambiguous at best. *See* Resp. Br., at 34-38. Neither opinion considered the issue at any length; both simply applied the syllogism "arraignment" equals "initiation of adversary proceedings." Under the terms of that abbreviated logic, the obverse should also obtain: "not arraignment" should equal "not the initiation of adversary proceedings."

But, even assuming Petitioner's assertion were true, that the Court had concluded in *dicta* that the right to counsel attaches at probable-cause hearings (and the better reading of those opinions is that it did not), the Court would not now be bound by those earlier statements—especially because the question of when the right attached was largely uncontested in both cases. As the Court noted regarding *Brewer* in *Texas* v. *Cobb*, "[c]onstitutional rights are not defined by inferences from opinions which did not address the question at issue." 532 U.S. 162, 169 (2001) (citing *Hagans* v. *Lavine*, 415 U.S. 528, 535 n.5 (1974)).

On any fair reading, *Brewer* and *Jackson* do not resolve the question presented in this case.

III. EVEN IF ADVERSARY JUDICIAL PROCEEDINGS HAD COMMENCED AT THE ARTICLE 15.17 MAGISTRATION, PETITIONER WAS NOT ENTITLED TO THE ASSISTANCE OF COUNSEL UNTIL A "CRITICAL STAGE" OCCURRED.

If the Court were to disagree with the Fifth Circuit's reliance on prosecutorial involvement to determine the onset of adversary judicial proceedings in Texas, the Court should nonetheless affirm because Petitioner was not, in any event, denied his Sixth Amendment right to counsel. The Court has made clear that the right to counsel requires both attachment *and* a "critical stage" in the prosecution. Without the latter, the supposed attachment of Petitioner's right to counsel remains purely academic, and the Fifth Circuit's ultimate conclusion that Petitioner was not denied that right is entirely correct.

Petitioner would rather this Court not address the critical stage issue, *see* Pet. Br., at 19-20 n.6, understandably so, since he cannot seriously argue that he was required to participate in a critical stage without assistance of counsel. However, Petitioner cannot establish that his Sixth Amendment right to counsel was violated without such a showing. The Court's decisions demonstrate that although a defendant may have the right to counsel, that right is not actionable by itself. There must be a "critical stage" of the prosecution at which the Sixth Amendment applies. *Jackson*, 475 U.S., at 629-30; *Gouveia*, 467 U.S., at 189; *Moore*, 434 U.S., at 229; *Brewer*, 430 U.S., at 400; *Wade*, 388 U.S., at 226-27. Indeed, in *Brewer*, the Court was careful to point out that even though it had concluded that the defendant's right to counsel had "no doubt" attached, 430 U.S., at 399, the

protection of the Sixth Amendment would not have come into play at all in the absence of a critical stage—in that case, the interrogation, *id.*, at 400. Similarly, in *Wade*, the Court noted that a denial of a right to have counsel present at such stages as a "systemized or scientific analyzing of the accused's fingerprints, blood sample, clothing, hair and the like" would not "violate the Sixth Amendment; they are not critical stages since there is a minimal risk that his counsel's absence at such stages might derogate from his right to a fair trial." *Wade*, 388 U.S., at 228-29. Without a critical stage, therefore, the Sixth Amendment right to counsel is simply not implicated.[6]

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6. Petitioner obliquely contends that this Court should not consider the "critical stage" issue because Respondent did not press the issue before the court of appeals and because the Fifth Circuit rejected Petitioner's claim on a separate ground. Pet. Br., at 19-20 n.6. But this Court reviews judgments, not statements in opinions, *California* v. *Rooney*, 483 U.S. 307, 311 (1987), and the judgment of the Fifth Circuit was that Petitioner's Sixth Amendment right to counsel had not been violated. Any contrary judgment would necessitate the conclusion that his right to counsel had been denied during a critical stage in the proceedings, and there is no serious argument on these facts that that occurred. *Cf. Rumsfield* v. *Forum for Academic & Institutional Rights*, 547 U.S. 47, 56 (2006) (internal quotation omitted) (noting that the Court's review "may, in our discretion, encompass questions fairly included within the question presented" and choosing to consider an argument presented by *amici* in spite of the government's claim that "this question was not before the Court because it was neither included in the questions presented or raised by FAIR"); *United States* v. *Mendenhall*, 446 U.S. 544 (1980) ("While the Court ordinarily does not consider matters neither raised nor decided by the courts below . . . it has done so in exceptional circumstances. . . . We consider the Government's contention . . . because the contrary assumption . . . rests on a serious misapprehension of federal constitutional law. And because the

The Court has defined "critical stages" as those events at which the criminal defendant "is confronted, just as at trial, by the procedural system, or by his expert adversary, or by both in a situation where the results of the confrontation might well settle the accused's fate and reduce the trial itself to a mere formality." *Gouveia*, 467 U.S., at 189 (internal quotations eliminated). Aside from police interrogation, the Court has concluded that a preliminary hearing at which the defendant entered a plea, an arraignment at which certain pleas could be lost, a psychiatric examination, and a post-indictment lineup are critical stages of the prosecution at which the right to counsel would attach. *See, e.g., Estelle* v. *Smith*, 451 U.S. 454, 470 (1981) (finding that a psychiatric examination in a capital case "proved to be a 'critical stage' of the aggregate proceedings against respondent"); *Moore*, 434 U.S., at 229) (finding a right to counsel at a preliminary hearing at which a victim identified the defendant); *Coleman* v. *Alabama*, 399 U.S. 1, 9-10 (1970) (finding right to counsel had attached at a preliminary hearing in which the State put on evidence of its case); *Wade*, 388 U.S., at 218, 227 (holding that a post-indictment lineup was a "critical stage"); *White* v. *State of Maryland*, 373 U.S. 59, 60 (1963) (holding that a preliminary hearing was a critical stage because the defendant entered a plea); *Hamilton* v. *Alabama*, 368 U.S. 52, 53-54 (1961) (finding that an arraignment is a critical stage because the rights to certain pleas, including insanity, may be lost). Petitioner's Article 15.17 magistration does not resemble

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determination is essential to the correct disposition of other issues in the case, we shall treat it as 'fairly comprised' by the questions presented in the petition for certiorari.") (internal citations omitted).

any of those events. Petitioner was not formally charged at the appearance, he was not required to enter a plea or make any other compromising statements, and was never confronted by his adversary—the prosecutor.

The Court's limitation of the right to counsel to such critical stages is consistent with the Sixth Amendment's purpose of protecting an accused from conviction as a result of his ignorance of his rights and makes imminent practical sense. Indeed, the Court has never suggested that States must provide attorneys to indigent defendants around the clock, nor could they reasonably do so.

Moreover, without the critical-stage limitation it would be impracticable to determine the point at which a violation of the Sixth Amendment right to counsel had occurred. For example, in Petitioner's case, he is studiously vague as to when he believes such a violation occurred. He concedes that he was not entitled to counsel *at* his Article 15.17 magistration. Pet. Br., at 19-20 n.6. Instead, he argues instead that he was entitled to appointed counsel some time "after" that proceeding. *Id.* When precisely, Petitioner does not say.

Nor for what purpose. Petitioner was released on bond following his Article 15.17 magistration and was free on bond until his indictment issued some six months later. During that time, not only did he face no critical stages, he faced no stages whatsoever. The only possible purpose to which Petitioner alludes is that counsel might have discovered that his California felony charges had ultimately been dismissed, and Petitioner presumably

might have avoided indictment altogether.[7] But that

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7. Some six months after his Article 15.17 magistration, Petitioner was indeed indicted for unlawful possession of a firearm by a felon, a third-degree felony. R. 340; TEX. PENAL CODE §46.04. Once Petitioner's counsel was appointed, he successfully argued that the Texas charge should be dismissed because Rothgery's Calfornia convictions had been dismissed through completion of a diversionary program, and, thus, strictly speaking, he was no longer a "felon." R. 436, 593.

There is no dispute, however, that Petitioner had committed two prior felonies, and his record shows two California felony convictions for possession of a controlled substance. *See* Superior Court of California, County of Orange, Case Number 96SFO443, at http://visionweb.occourts.org/Vision_Public/DisplayCaseInfo.do (last visited Feb. 21, 2008). After completing a diversionary program, California law allowed him to petition the court to withdraw his guilty plea and have the case against him dismissed. R. 462, 593. The California statute authorizing this procedure, California Penal Code section 1203.4(a), is not technically an expungement statute because it does not erase the conviction from a defendant's record. As one California court explained, "while a number of courts have used forms of the word 'expunge' to describe the relief made available by section 1203.4 . . . the statute does not in fact produce such a dramatic result. . . . The statute does not purport to render the conviction a legal nullity." *People* v. *Frawley*, 82 Cal. App. 4th 784, 791 (Cal. Ct. App. 2000).

And, even though the statute does remove certain disabilities and penalties, it does not qualify those who have committed felonies to carry firearms. CAL. PENAL CODE §1203.4(a) ("Dismissal of an accusation or information pursuant to this section does not permit a person to own, possess, or have in his or her custody or control any firearm or prevent his or her conviction under Section 12021."); *see also People* v. *Bell*, 49 Cal. 3d 502, 546 (Cal. 1989) ("[T]he Legislature . . . specifically declare[d] that dismissal of a charge [under §1203.4] after completion of probation does *not* permit the person to own or possess a . . . firearm."). Thus, if Petitioner had engaged in the identical conduct in California that he did in Texas, he would have committed a felony under California law. CAL. PENAL CODE §12021(a)(1) (prohibiting felons from possessing firearms).

putative purpose has been explicitly rejected by this Court:

> "[I]t may well be true that in some cases preindictment investigation could help a defendant prepare a better defense. But, as we have noted our cases have never suggested that the purpose of the right to counsel is to provide a defendant with a *preindictment private investigator*, and *we see no reason to adopt that novel interpretation* of the right to counsel in this case." *Gouveia*, 467 U.S., at 191 (emphasis added).

Aside from hoping for a "preindictment private investigator," Petitioner suggests no purpose for which counsel might have served during the months he remained free and unindicted.

Thus, under Petitioner's theory, the Sixth Amendment requires that counsel have been appointed at an indeterminate time "after" his probable-cause hearing, for an indeterminate purpose, irrespective of any critical stages or further proceedings in the case.

The Constitution contains no such mandate. And state and local governments should not be confronted with such an amorphous and all-encompassing obligation. Petitioner's right to a fair trial was fully protected—and that is all that the Sixth Amendment right to counsel requires.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the court of appeals.

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February 2008

84 59574 (13)

20 pgs

No. 07-440

In The
Supreme Court of the United States

WALTER ALLEN ROTHGERY,

Petitioner,

v.

GILLESPIE COUNTY, TEXAS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF AMICUS CURIAE TEXAS ASSOCIATION OF COUNTIES AND TEXAS DISTRICT AND COUNTY ATTORNEYS ASSOCIATION IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the Petitioner's Sixth Amendment right to counsel attached when he was brought before a magistrate, as is required by statute for all arrested persons in Texas.

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INTEREST OF AMICUS CURIAE[1]

This amicus brief is filed on the behalf of the Texas Association of Counties (TAC), which has been formed to represent county interests in the legislative process in Texas and to inform counties of issues that affect them. The mission of the TAC is to provide services to Texas counties and assistance to all county officials. This amicus brief is also filed on the behalf of the Texas District and County Attorneys Association (TDCAA), which is a non-profit organization dedicated to serving Texas prosecutors and attorneys in government representation. The TDCAA serves the people who work in the district and county attorneys offices across Texas.

INTRODUCTION

In this case, the Petitioner has complained that county jail officials may not have honored requests that he be appointed an attorney, and he has claimed that he should not have been charged with a particular offense. The Petitioner should not be permitted to transform these claims into a violation of his Sixth

[1] Pursuant to this Court's Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus curiae* made a monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.3, *amicus curiae* states that the Petitioner and the Respondent have consented to the filing of this brief.

Amendment right to counsel. Such a transformation is not at all consistent with this Court's Sixth Amendment jurisprudence. The Petitioner has advocated a position that represents an unnecessary and inappropriate broadening of the Sixth Amendment right to counsel, as well as a fundamental misunderstanding of Texas law.

An arrested person's appearance before a magistrate under Article 14.06 and/or Article 15.17 of the Texas Code of Criminal Procedure does not constitute the initiation of adversarial judicial proceedings for the purposes of a criminal defendant's Sixth Amendment right to counsel. Furthermore, in Texas, there are statutory remedies that allow for the appointment of an attorney to an indigent defendant shortly after he has been arrested. There is no need to expand the Sixth Amendment right to counsel far beyond the long-standing parameters set by this Court.

ARGUMENT

The Sixth Amendment Right to Counsel Is Triggered by the Commencement of a Prosecution

In this case, this Court is once again squarely confronted with the fundamental basis for a criminal defendant's Sixth Amendment right to counsel.

> The Sixth Amendment's intended function . . . is to assure that in any "criminal prosecutio[n]," the accused shall not be left to his

> own devices in facing the "prosecutorial forces of organized society." By its very terms, it becomes applicable only when the government's role shifts from investigation to accusation. For it is only then that the assistance of one versed in the "intricacies . . . of law," is needed to assure that the prosecution's case encounters "the crucible of meaningful adversarial testing."

Moran v. Burbine, 475 U.S. 412, 430 (1986) (quoting *Maine v. Moulton*, 474 U.S. 159, 170 (1985); *United States v. Cronic*, 466 U.S. 648, 656 (1984); *Kirby v. Illinois*, 406 U.S. 682, 689 (1972)). "[U]ntil such time as the 'government has committed itself to prosecute, and . . . the adverse positions of government and defendant have solidified' the Sixth Amendment right to counsel does not attach." *Moran*, 475 U.S. at 431 (quoting *United States v. Gouveia*, 467 U.S. 180, 189 (1984); *Kirby v. Illinois*, 406 U.S. 682, 689 (1972)). Thus, for a defendant to have a Sixth Amendment right to counsel, there must be a "prosecution." The government must be "committed" to "prosecute" the defendant. And there must be a "solidified" adversarial relationship between the citizen accused and the prosecution. Nothing akin to a criminal prosecution took place or was even initiated at or near the time that the Petitioner was brought before a magistrate. The Petitioner's initial appearance before a magistrate was not adversarial, was not accompanied by the advocacy of a prosecutor, and was not accompanied by the filing of any formal charges. The Petitioner was merely informed of the reason that he had

been arrested, and he was informed of his rights at that time.

In order to bring his appearance before a magistrate into the Sixth Amendment context, the Petitioner has relied quite heavily upon a comparison with the "arraignments" that confronted this Court in *Brewer v. Williams*, 430 U.S. 387 (1977), and *Michigan v. Jackson,* 475 U.S. 625 (1986). But in neither of those cases was this Court primarily confronted with the question of the attachment of the Sixth Amendment right to counsel. Rather, in those cases, this Court was primarily confronted with the existence or validity of waivers of the defendants' Sixth Amendment right to counsel. Nevertheless, even when a comparison is drawn to those two cases, it is readily apparent that the Petitioner here was not "arraigned" before a "judge" in a courtroom. *Cf. Brewer*, 430 U.S. at 399. Nor had been "formally charged." *Cf. Jackson*, 475 U.S. at 626.

This Court's decisions have consistently required a criminal prosecution before the Sixth Amendment right to counsel attaches, and there was no criminal prosecution at or even immediately after the Petitioner's initial appearance before a magistrate. In *United States v. Gouveia,* this Court was primarily confronted with the question of the attachment of the Sixth Amendment right to counsel, and – as it would in *Moran v. Burbine* – this Court presented an interpretation of the Sixth Amendment right to counsel that was

> consistent not only with the literal language of the Amendment, which requires the existence of both a "criminal prosecutio[n]" and an "accused," but also with the purposes which we have recognized that the right to counsel serves. We have recognized that the "core purpose" of the counsel guarantee is to assure aid at trial, "when the accused [is] confronted with both the intricacies of the law and the advocacy of the public prosecutor."

United States v. Gouveia, 467 U.S. 180, 188-89 (1984) (quoting *United States v. Ash,* 413 U.S. 300, 309 (1973) (footnote omitted)). Thus, this Court has repeatedly reaffirmed that, before it can be said that a criminal defendant's Sixth Amendment right to counsel has attached, there must be a criminal prosecution. And there must be the involvement of the public prosecutor, who is committed to prosecute. Contrary to the Petitioner's repeated claims that the involvement or even existence of a prosecutor is unnecessary to the Sixth Amendment right to counsel, "the right to counsel exists to protect the accused during trial-type confrontations with the prosecutor . . . " *Gouveia*, 467 U.S. at 190 (emphasis added). *See also Anderson v. Alameida,* 397 F.3d 1175, 1180 (9th Cir.), *cert. denied,* 546 U.S. 846 (2005) (necessity of involvement of prosecutor before attachment of Sixth Amendment right to counsel can occur).

In *Gouveia*, this Court acknowledged concerns, similar to concerns articulated by the Petitioner in the instant case,

> that the Government may delay the initiation of formal charges, thus delaying the appointment of counsel, while it develops its case against the isolated and unaided inmate. By the time the Government decides to bring charges . . . witnesses' memories could have dimmed, alibi witnesses could have been transferred to other facilities, and physical evidence could have deteriorated.

Gouveia, 467 U.S. at 191. Those concerns do not trigger a defendant's Sixth Amendment right to counsel, however. "Those concerns, while certainly legitimate ones, are simply not concerns implicating the right to counsel, and. . . . the mere 'possibility of prejudice [to a defendant resulting from the passage of time] . . . is not itself sufficient reason to wrench the Sixth Amendment from its proper context.'" *Gouveia*, 467 U.S. at 191 (quoting *United States v. Marion*, 404 U.S. 307, 321-22 (1971)). Likewise, the concerns that the Petitioner has raised in this case may be serious. But the Petitioner's concerns do not implicate the Sixth Amendment right to counsel, and they certainly do not necessitate a broadening of a criminal defendant's Sixth Amendment right to counsel by the advancement of a new "bright line" rule.

This Court has repeatedly held that the Sixth Amendment right to counsel attaches only at the initiation of adversary criminal proceedings. Prior to the time that those proceedings are initiated, a suspect in a criminal investigation has no *constitutional*

right to the assistance of counsel. *Davis v. United States*, 512 U.S. 452, 456-57 (1994) (citing *United States v. Gouveia*, 467 U.S. 180, 188 (1984)). A defendant may be able to articulate a desire for an attorney prior to the time that those proceedings are initiated, but that defendant does not articulate a right to counsel that is recognized by the Sixth Amendment.

In this case, the Petitioner has argued that, if an attorney had been appointed for him after the time that he had been brought before a magistrate, "the mistake underlying his arrest would have been discovered at that time, and he would not have been subject to bond for a lengthy period and wrongfully rearrested and jailed for nearly three weeks." Pet'r Br. at 8. Whether or not these assertions are accurate, the Petitioner has not articulated a need for an attorney that justifies the broadening of a criminal defendant's Sixth Amendment right to counsel.

Appearance Before a Magistrate in Texas

The Petitioner's characterization of his appearance before a magistrate as the initiation of adversarial judicial proceedings also represents a flawed interpretation of Texas law. In Texas, after an "offender" is arrested without a warrant, as the Petitioner was in this case, the offender must be taken before a magistrate within 48 hours of the arrest at the very latest. The offender is then treated like all offenders who are arrested and then brought before a

magistrate, as set forth in Article 15.17 of the Texas Code of Criminal Procedure. *See* TEX. CODE CRIM. PROC. ANN. art. 14.06(a) (Vernon Supp. 2007). Chapter 15 of the Code of Criminal Procedure applies to those situations in which an offender has been arrested with a warrant, and Chapter 14 of the Code applies to those situations in which an offender has been arrested without a warrant. But all are treated the same, and all are provided with a statutory right to an attorney shortly after having been arrested.

Article 15.17(a) requires that the offender or arrested person be brought before "some" magistrate of the county where the person was arrested. If it is more "expeditious," the arrested person can be brought "before a magistrate in any other county of this state." *See* TEX. CODE CRIM. PROC. ANN. art. 15.17(a) (Vernon Supp. 2007). The ability of a law enforcement officer to take an arrested person before the nearest magistrate does not suggest that the officer is preparing to initiate a criminal "prosecution" against the suspect. There is no suggestion that, by the law enforcement officer's action, a prosecutor – or even the State of Texas in general – will become "committed to prosecute" the suspect. There is no suggestion that the law enforcement officer is confronting the suspect with the advocacy of the "public prosecutor."

It cannot truly be that the act of taking an arrested person before a magistrate, as required by Article 15.17 of the Texas Code of Criminal Procedure, constitutes the initiation of adversarial judicial

proceedings because the arrested person is to be taken before the magistrate in the county where he was arrested. *See* TEX. CODE CRIM. PROC. ANN. art. 15.17(a) (Vernon Supp. 2007). If the offense that is ultimately charged against that defendant was in fact committed in another county, adversarial judicial proceedings – for the purposes of the Sixth Amendment right to counsel – would have been initiated where the charged offense did not even occur.

The Fifth Circuit Court of Appeals, interpreting Texas law, has reached the same conclusion in a previous decision. In *McGee v. Estelle*, the defendant contended that his appearance before a magistrate in Texas triggered the adversary process and his Sixth Amendment right to counsel. As it has in this case, the Fifth Circuit Court of Appeals disagreed, instead holding that an appearance before a magistrate for statutory warnings under Texas law – specifically Article 14.06 of the Texas Code of Criminal Procedure – did not involve counsel for the State, and did not constitute a formal charge. Rather, the court of appeals held that the requirement of an appearance before a magistrate under Article 14.06 (as well as Article 15.17) was imposed in order to comply with the requirements set forth in *Miranda v. Arizona*, 384 U.S. 436 (1966). *McGee v. Estelle*, 625 F.2d 1206, 1209 (5th Cir. 1980), *cert. denied*, 449 U.S. 1089 (1981).

In support of this holding, the Fifth Circuit Court of Appeals in *McGee* relied upon the following language from this Court,

> The initiation of judicial criminal proceedings is far from a mere formalism. It is the starting point of our whole system of adversary criminal justice. For it is only then that government has committed itself to prosecute, and only then that the adverse positions of government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law. It is this point, therefore, that marks the commencement of the 'criminal prosecutions' to which alone the explicit guarantees of the Sixth Amendment are applicable.

McGee, 625 F.2d at 1209 (quoting *Kirby v. Illinois,* 406 U.S. 682, 689-90 (1972)). Thus, well before the lower court's holding in this case, it has long been the law in the Fifth Circuit that an arrested person's appearance before a magistrate under Article 14.06 and/or Article 15.17 of the Texas Code of Criminal Procedure does not constitute the initiation of adversarial judicial proceedings for the purposes of a criminal defendant's Sixth Amendment right to counsel.

The Petitioner has insisted on characterizing his appearance before a magistrate as the appearance before a "court" or a "judge." The Petitioner has claimed that his Sixth Amendment right to counsel had attached at the time that he was brought before a magistrate because "a *court* ha[d] confronted the defendant with the accusation against him and

imposed restrictions on his liberty to ensure that he answer[ed] that accusation." Pet'r Br. at 19 (emphasis added). The Petitioner has claimed that he "underwent precisely the type of initial *court* appearance that this Court held in [*Brewer v. Williams,* 430 U.S. 387 (1977)] and [*Michigan v. Jackson,* 475 U.S. 625 (1986)] initiated adversary judicial proceedings and triggered the right to counsel." Pet'r Br. at 3 (emphasis added). The Petitioner has claimed, "A *court* had formally apprised him of that accusation and had imposed restrictions on his liberty to ensure his appearance at subsequent proceedings to answer that accusation." Pet'r Br. at 28 (emphasis added). The Petitioner claimed that he was "confronted by the sovereign authority of the State in the person of a *judge* . . . " Pet'r Br. at 38 (emphasis added).

But, in Texas, when an arrested person is brought before a "magistrate" in order to be informed of his rights under Article 14.06 or Article 15.17 of the Texas Code of Criminal Procedure, the arrested person is not brought before a "court" or "judge," and adversary *judicial* proceedings have not been initiated against that arrested person. Indeed, in Texas, when one appears before a magistrate, he may not be appearing before a judge at all. In addition to judges, a magistrate can be any number of individuals – such as a "hearing officer," a "justice of the peace," or a "mayor" or "recorder" of an incorporated city or town. *See* TEX. CODE CRIM. PROC. ANN. art. 2.09 (Vernon Supp. 2007). This is reflective of the fact that an offender's appearance before a magistrate in Texas is

a preliminary, investigatory event, and not a prosecutorial and judicial proceeding.

In light of the fact that all arrested persons in Texas are to be brought before a magistrate shortly after having been arrested, it would certainly be inappropriate to institute a "bright line" rule giving a Sixth Amendment right to counsel to an arrested person's appearance before a magistrate. In Texas, such a rule would essentially give a Sixth Amendment right to counsel to all who have been arrested – very shortly after they have been arrested. This Court has never held that the Sixth Amendment right to counsel attaches at or near the time of an offender's arrest. *See Gouveia*, 467 U.S. at 190.

The Right to Counsel Is Protected by Texas Statute

In the absence of being awarded a Sixth Amendment right to counsel at the time of an appearance before a magistrate, the Petitioner would leave this Court with the impression that a criminal defendant in Texas has no other remedy and no other means by which he can gain access to an attorney. Nothing could be further from the truth. In Texas, in addition to being entitled to representation of counsel during an adversarial judicial proceeding, a defendant is also entitled to consult with an attorney sufficiently in advance of the proceeding in order to allow for adequate preparation for that proceeding. *See* TEX. CODE CRIM. PROC. ANN. art. 1.051(a) (Vernon Supp. 2007).

Indigent defendants are entitled to the appointment of counsel, even if adversarial judicial proceedings have *not* been initiated against the defendant. Counsel must be appointed for an indigent defendant within three days of receiving a request for the appointment of counsel, or within one day in counties with a population of 250,000 or more. *See* TEX. CODE CRIM. PROC. ANN. art. 1.051(i) (Vernon Supp. 2007).

The Petitioner laments the fact that "Gillespie County followed a policy of not appointing counsel for indigent defendants released on bond until after their first court appearance following information or indictment." Pet'r Br. at 7. But Texas law in fact permits a county to not have counsel appointed for indigent defendants who are released on bond, until there is a court appearance or an adversarial judicial proceeding. *See* TEX. CODE CRIM. PROC. ANN. art. 1.051(j) (Vernon Supp. 2007) ("[I]f an indigent defendant is released from custody prior to the appointment of counsel . . . appointment of counsel is not required until the defendant's first court appearance or when adversarial judicial proceedings are initiated, whichever comes first."). But the fact remains that the Petitioner was statutorily entitled to the appointment of counsel within three days after having requested it, pursuant to Article 1.051(i). There is no need for this Court to provide a constitutional remedy to the Petitioner where such a remedy did not previously exist.

Furthermore, in compliance with TEX. CODE CRIM. PROC. ANN. art. 26.04(a) (Vernon Supp. 2007) – which

was enacted as part of the Fair Defense Act in Texas – several counties and their respective courts have adopted rules for the appointment of counsel to indigent defendants. For example, Bexar County Criminal District Court Rules 5.15 and 5.16 require the appointment of counsel for indigent defendants, as soon as they have made such a request after having been arrested and brought before a magistrate. *See also, e.g.,* Rule 6.13 of the Fort Bend County Courts at Law Local Rules; Rule 5.20 of the Local Administrative Rules of the District Courts and County Courts at Law of Lubbock County; Montgomery County Fair Defense Act Local Rules. The Respondent, Gillespie County, has rules of its own that have been adopted in compliance with the statute. There is no need to remove the flexibility of Texas counties – including small, rural counties like Gillespie County – to implement effective procedures for the appointment of counsel for arrested persons.

A criminal defendant may never be charged after having been brought before a magistrate. But the Petitioner's remedy advocated in this case would require each and every defendant to be afforded a Sixth Amendment right to counsel, even though formal charges are never actually initiated against the defendant. The unnecessary cost would not protect the Sixth Amendment right to counsel, as outlined by this Court. But it would impose a hardship upon Texas counties – especially small or rural counties that is not appropriate and is not required by this Court's Sixth Amendment jurisprudence.

Criminal defendants in Texas, particularly indigent criminal defendants, are well-protected with regard to their right to an attorney, even shortly after having been arrested. There is no need for this Court to adopt a "bright line" rule for Texas or the nation that would greatly expand a criminal defendant's Sixth Amendment right to an attorney. This Court should uphold the ruling of the Fifth Circuit Court of Appeals in this case that the Petitioner's Sixth Amendment right to counsel had not attached at the time that he was brought before a magistrate.

CONCLUSION

For the foregoing reasons, the judgment of the Fifth Circuit Court of Appeals should be affirmed.

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28pgs
FILED
JAN 2 1 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 07-440

In the Supreme Court of the United States

WALTER ALLEN ROTHGERY
Petitioner,

v.

GILLESPIE COUNTY, TEXAS
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICI CURIAE* TWENTY-FOUR PROFESSORS OF LAW IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether petitioner's right to counsel under the Sixth Amendment had attached after he was arrested and brought before a magistrate who informed him of his rights and of the accusation against him, found probable cause that he had committed the offense he was accused of, and committed him to jail pending trial or the posting of bail.

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County of Riverside v. McLaughlin, 500 U.S. 44 (1991) 4, 16, 17, 21, 22

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Michigan v. Jackson, 475 U.S. 625 (1986).....*passim*

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Akhil Reed Amar, *Sixth Amendment First Principles*, 84 Geo. L.J. 641 (1996) 14, 22

American Bar Ass'n, Gideon's *Broken Promise: America's Continuing Quest for Equal Justice* (2004) 8

William M. Beaney, *The Right to Counsel in American Courts* (1955) 9-10

Caroline Wolf Harlow, U.S. Dept. of Justice, Bureau of Justice Statistics, Defense Counsel in Criminal Cases (2000), http://www.ojp.usdoj.gov/bjs/pub/pdf/dccc.pdf 12

Francis H. Heller, *The Sixth Amendment to the Constitution of the United States* (1951) 9, 10

Steven K. Smith & Carol J. DeFrances, U.S. Dept. of Justice, Bureau of Justice Statistics, Indigent Defense (1996) 8-9

U.S. Dept. of Ed., National Center for Education Statistics, Literacy Behind Bars: Results from the 2003 National Assessment of Adult Literacy Prison Survey (2007), http://nces.ed.gov/pubs2007/2007473.pdf 12

INTEREST OF *AMICI CURIAE*[1]

Amici are law professors[2] whose teaching and research interests include matters of criminal procedure. *Amici* have an interest in this case because the lower court's decision undermines the right to counsel protected under the Sixth Amendment. As professors of law, *amici* are keenly aware of the essential role that counsel play in

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission.

[2] This brief represents the views of the following professors of law: Susan Bandes, DePaul University School of Law; John Blume, Cornell Law School; Craig Bradley, Indiana University School of Law–Bloomington; Douglas L. Colbert, University of Maryland School of Law; Joshua Dressler, Ohio State University Moritz School of Law; Stuart Green, Louisiana State University Paul M. Hebert Law Center; Bernard Harcourt, University of Chicago Law School; Susan N. Herman, Brooklyn Law School; John Junker, University of Washington School of Law; Yale Kamisar, University of Michigan Law School; Arnold Loewy, Texas Tech University School of Law; Erik Luna, University of Utah S.J. Quinney College of Law; Bridget McCormack, University of Michigan Law School; Tracey Meares, Yale Law School; David Moran, Wayne State University Law School; Anne Bowen Poulin, Villanova University School of Law; Daniel Richman, Columbia Law School; Stephen Saltzburg, George Washington University Law School; Christopher Slobogin, University of Florida Levin College of Law; Carol Steiker, Harvard Law School; Jordan Steiker, University of Texas School of Law; George Thomas, Rutgers School of Law–Newark; James Tomkovicz, University of Iowa College of Law; and Charles Whitebread, University of Southern California Law School. They do not join this brief as representatives of their respective institutions.

protecting the integrity of our criminal justice system. Our nation relies upon its lawyers to defend those whose freedom is at stake and to ensure that justice is done to all persons, innocent and guilty, wealthy and poor. *Amici* file this brief to urge this Court to clarify that when the government accuses a person of having committed a crime and places substantial restrictions on his liberty, that person is entitled to a lawyer to defend his liberty.

INTRODUCTION AND SUMMARY OF ARGUMENT

In this case, an innocent man was arrested and jailed for a crime it was legally impossible for him to commit—he was accused of being a felon in possession of a firearm, though he was not in fact a felon at all. Once his oft-repeated request for appointed counsel was finally granted, the charges against him were determined to be baseless and dropped—but not before petitioner Walter Rothgery spent weeks in jail. Pet. Br. 3. This case presents the Court with an opportunity to prevent such injustices in the future by clarifying its rule regarding when the Sixth Amendment right to counsel attaches.

This Court has consistently held that the right to counsel under the Sixth Amendment[3] attaches at the initiation of adversary judicial proceedings. While those proceedings may commence in a variety of ways—*e.g.*, by charge indictment, information, or

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[3] Rothgery's right to counsel arose under the Fourteenth Amendment, which incorporates the protection of the Sixth Amendment. *See Gideon v. Wainwright*, 372 U.S. 335, 342 (1963). For simplicity's sake, this brief refers to the right to counsel as a Sixth Amendment right.

arraignment—the right to counsel attaches as soon as they do. The Fifth Circuit's holding in the present case cannot be reconciled with this Court's precedents, and it should be reversed.

The present case also offers the Court an opportunity to simplify the analysis of when the right to counsel attaches in other cases, reducing the likelihood that future innocent persons will be jailed before trial for extended periods of time without the assistance of counsel. The history and purposes of the Sixth Amendment, as well as this Court's precedents, support the conclusion that the Sixth Amendment guarantees a right to counsel to defend a person's liberty when that liberty is threatened. The current "initiation of judicial proceedings" rule attempts to get at when such defense is needed. *Amici* submit that a modest refinement of the test would improve it.

Specifically, *amici* propose that the Court make explicit what is already implicit in its cases. The Court should declare that, following a warrantless arrest, the right to counsel has attached, at the latest, when there has been a judicial determination of probable cause and the government has imposed significant restrictions on a person's liberty. Such a rule is consistent with this Court's precedents and readily applicable notwithstanding the vagaries of state procedure.

The rule *amici* suggest draws upon two lines of authority. In one, this Court has explained that the right to counsel attaches at the initiation of adversary judicial proceedings—the point at which a "suspect" becomes an "accused." *Michigan v. Jackson*, 475 U.S. 625, 632 (1986); *see also Brewer v.*

Williams, 430 U.S. 387, 398 (1977). In the second line of authority, this Court has held that the government may not impose significant restraints upon a person's liberty for more than 48 hours following arrest without a judicial determination of probable cause. *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991); *Gerstein v. Pugh*, 420 U.S. 103 (1975). These two lines of authority, read together, support a simple, bright-line rule: following a warrantless arrest, the right to counsel attaches, at the latest, when there has been a judicial determination of probable cause and significant restrictions on the accused's liberty have been imposed. The proposed rule would not necessarily require counsel to be appointed for a *Gerstein* hearing. Rather, it would simply recognize that a person has a right to a lawyer once the hearing is complete if the result is to impose an ongoing, significant restriction on the accused's liberty.

ARGUMENT

I. The Fifth Circuit's Decision Cannot Be Reconciled With This Court's Precedents.

A. Under this Court's precedents, the right to counsel attaches at the initiation of adversary proceedings, when a suspect becomes an accused.

This Court has long held that the right to counsel attaches at the initiation of adversary judicial proceedings. *See, e.g.*, *Brewer v. Williams*, 430 U.S. 387, 398 (1977) (citing cases). The Court has made clear that adversary proceedings might commence in any number of ways, such as by "formal charge, preliminary hearing, indictment, information, or

arraignment." *Id.* But no matter *how* proceedings might commence, this Court has consistently said that the right to counsel attaches *as soon as they do*.

Thus, in *Michigan v. Jackson*, 475 U.S. 625 (1986), the Court summarily rejected the argument that under Michigan's particular procedures, arraignment did not trigger the right to counsel. *See id.* at 629 n.3. The Court explained that the Sixth Amendment provides a right to counsel once "a person who had previously been just a 'suspect' has become an 'accused,'" including by formal accusation at an arraignment. *Id.* at 632.

In contrast, *before* the initiation of adversary judicial proceedings, there is no right to counsel. In *Kirby v. Illinois*, 406 U.S. 682 (1972), for example, the Court held that the right to counsel had not attached when Kirby was identified in a police lineup shortly after arrest. *Id.* at 684-685 (plurality opinion). In *Jackson*'s terms, Kirby—who had been picked up by the police for carrying another man's social security card and travelers' checks—was merely a suspect when his victim came in and identified him. *See id.*

This Court's focus on the initiation of adversary judicial proceedings—the moment of transition between "suspect" and "accused"—reflects an understanding that varied state procedures and the varied facts of specific cases can make it hard to identify a single, specific triggering event at which the right to counsel attaches in all cases. Instead, the Court's rule is essentially that the right to counsel attaches *whenever* the government determines that it shall be adverse to an individual, seeking to

deprive him of his liberty. *See Brewer*, 430 U.S. at 398; *Kirby*, 406 U.S. at 689.

B. The decision below cannot be reconciled with this Court's precedents.

The Fifth Circuit's decision below cannot be squared with this Court's precedents and it should be reversed. It is clear that Rothgery was, in fact, "arraigned" in the sense in which *Jackson* used the term when he appeared in front of the magistrate. *See* Pet. Br. 20-21 & n.7 (explaining meaning of arraignment); Pet. App. 14a-15a (describing Rothgery's appearance before the magistrate). In light of the Court's statement in *Jackson* that "arraignment signals 'the initiation of adversary judicial proceedings,'" the fact that Rothgery had been arraigned should have ended the inquiry. *Jackson*, 475 U.S. at 629; *see also id.* at 629 n.3 (noting the "clear language in our decisions about the significance of arraignment"). Indeed, as petitioner points out, the arraignment in this case cannot be distinguished from the arraignment in *Jackson*. Pet. Br. 27-30.

Similarly, the *Jackson* Court's discussion of the Sixth Amendment significance of the line between being a "suspect" and an "accused" should have dispelled any doubt that Rothgery's right had attached. *See Jackson*, 475 U.S. at 632 (distinguishing between being an accused and a suspect); Pet. App. 15a (court below noting that the magistrate "informed Rothgery that Rothgery was *accused* of the criminal offense of unlawful possession of a firearm by a felon") (emphasis added); *id.* at 35a (the magistrate's warning to Rothgery stating that "[y]ou are *accused* of the criminal offense

of: unlawful possession of a firearm by a felon") (emphasis added).

The Fifth Circuit, however, declined to recognize the significance of the fact that Rothgery's arraignment made him an "accused." Instead, the lower court focused on that court's own precedents as well as language from Justice Stewart's plurality opinion in *Kirby*, *see* Pet. App. 5a-6a (the court below attempting to ascertain whether "the government has committed itself to prosecute and a defendant finds himself faced with the prosecutorial forces of organized society") (citations and quotation marks omitted), and concluded that Rothgery's right to counsel would attach only at the point where he could prove that the prosecutor was aware of or involved in the proceedings. Because Rothgery had not proved that the prosecutor knew about the arrest and the arraignment, the Fifth Circuit held that Rothgery's right to counsel had not attached. *See* Pet. App. 12a.

Once a person has stood before a court, been accused of a crime, and had his liberty taken away, he is "accused," whether a prosecutor happened to be directly involved or not, and *Kirby* does not suggest otherwise. There, Justice Stewart was merely explaining why the right to counsel does not apply when a person has been arrested but *not* charged. As the *Jackson* Court would have put it, Kirby was a mere suspect rather than an accused. *See Jackson*, 475 U.S. at 632. Rothgery was plainly an accused.

Moreover, even on its own terms, the Fifth Circuit's decision is incorrect. This Court has held that the knowledge of one state actor must be imputed to another in the Sixth Amendment context.

Jackson, 475 U.S. at 634 (stating that, in the Sixth Amendment context, "we impute the State's knowledge from one state actor to another"). The Court explained: "the Sixth Amendment concerns the confrontation between the State and the individual. One set of state actors (the police) may not claim ignorance of defendants' unequivocal request for counsel to another state actor (the court)." *Id.* Since, under *Jackson*, the police cannot claim ignorance of what occurs in court, there is no justification for permitting a prosecutor, who is an officer of the court, to claim ignorance of an arraignment. The Fifth Circuit's prosecutorial-involvement test is thus barred by *Jackson*.

Even if this Court had not already rejected the Fifth Circuit's approach, the Court should not now adopt it. Petitioner has explained that the Fifth Circuit's rule would be impractical and that it would impose serious hardship on indigent defendants. Pet. Br. 38-44. In addition, the Fifth Circuit's approach will have the inevitable effect of undermining the right to counsel. In many cases, pretrial detention is for all intents and purposes the actual punishment for the alleged offense, and a denial of counsel to those imprisoned before indictment will effectively deny them counsel to contest their imprisonment at all. *See* American Bar Ass'n, Gideon's *Broken Promise: America's Continuing Quest for Equal Justice* 23 (2004) (noting that "in some places throughout the country, poor persons accused of crime are arrested and detained in local jails for months or even years before they have a chance to speak with a lawyer"); *see also* Steven K. Smith & Carol J. DeFrances, U.S. Dept. of Justice, Bureau of Justice Statistics, Indigent Defense 4 tbl. 7 (1996)

(more than one-third of state jail inmates waited more than two weeks for their first meeting with assigned counsel). The Fifth Circuit's approach exalts form over substance, too often providing counsel when it is too late to do any good.

The decision below is fundamentally inconsistent with this Court's precedents. Moreover, even if this Court were writing on a blank slate, it should reject the Fifth Circuit's rule because it is both impractical and insufficiently protective of the core purposes of the right to counsel. *Amici* submit, however, that the Court should also take this opportunity to clarify that, following a warrantless arrest, the right to counsel has attached, at the latest, once a court finds probable cause to believe a person has committed the crime of which he has been accused and has imposed significant restraints upon his liberty.

II. This Court Should Hold That, Following A Warrantless Arrest, The Right To Counsel Attaches Once A Court Has Found Probable Cause To Commit An Accused To Custody.

A. The Sixth Amendment guarantees a right to counsel to defend an accused's liberty.

Under the common law, while parties in civil cases and misdemeanor defendants were entitled to counsel, defendants in felony cases had no right to the assistance of counsel. Francis H. Heller, *The Sixth Amendment to the Constitution of the United States* 9-10 (1951). *Cf.* William M. Beaney, *The Right to Counsel in American Courts* 8-11 (1955) (noting that, over time, judges in England recognized the injustice of the rule and increasingly permitted

counsel to play a role in the defense). That rule changed only slightly after the Glorious Revolution, when defendants in treason cases gained the right to counsel (a matter of special concern to the political classes). Heller, *The Sixth Amendment to the Constitution*, at 10. But it was not until 1836 that those accused of other felonies were granted the right to counsel. *Id.*[4]

The Sixth Amendment was a rejection of the common law approach. *Id.* at 109; *see also Powell v. Alabama*, 287 U.S. 45 (1932). This Court, in explaining that the common law rule never gained traction in America, assessed it harshly: "An affirmation of the right to the aid of counsel in petty offenses, and its denial in the case of crimes of the gravest character, where such aid is most needed, is ... outrageous and ... obviously a perversion of all sense of proportion." *Powell*, 287 U.S. at 60. In America, the Court noted, the right to be heard by counsel has always been seen to be "fundamental." *Id.* at 68, 70, 73.

The American rule, embodied in the Sixth Amendment, recognizes that "the right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel." *Id.* at

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[4] The common law deprived the accused of other rights that are now explicitly protected by the Sixth Amendment. For example, until 1606, an accused was not permitted to present witnesses at all in his defense. Heller, *The Sixth Amendment to the Constitution*, at 9. Even then, defense witnesses could not be sworn; that right was denied until the beginning of the eighteenth century for felony trials. *Id.* & n.34. At common law, an accused felon was not even entitled to receive a copy of the indictment against him. *Id.* at 10.

68-69. Indeed, in our Nation's tradition, the importance of having counsel to represent one's interests can hardly be overstated. This Court has approvingly quoted the adage that "a lawyer who represents himself has a fool for a client." *Kay v. Ehrler*, 499 U.S. 432, 438 (1991). The layman is in even greater need of counsel. Justice Sutherland, writing for the Court in *Powell*, explained:

> Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.

287 U.S. at 69. Justice Sutherland continued: "If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect." *Id.*

Those words aptly describe the situation of indigent defendants today, who depend on the court to protect their right to counsel. As this Court is aware, approximately eighty percent of state felony

defendants use court-appointed lawyers. *Kowalski v. Tesmer*, 543 U.S. 125, 140 (2004) (Ginsburg, J., dissenting) (citing Caroline Wolf Harlow, U.S. Dept. of Justice, Bureau of Justice Statistics, Defense Counsel in Criminal Cases 1, 5 (2000), http://www.ojp.usdoj.gov/bjs/pub/pdf/dccc.pdf). Many of those defendants, like sixty-eight percent of the state prison population, did not complete high school; many lack basic literacy skills. *Halbert v. Michigan*, 545 U.S. 605, 621 (2005) (citations omitted). Indeed, this Court has observed that seven of ten inmates are unable to perform such basic tasks as writing a letter to explain an error on a credit card bill, using a bus schedule, or stating in writing an argument made in a newspaper article. *Id.*; *see also* U.S. Dept. of Ed., National Center for Education Statistics, Literacy Behind Bars: Results from the 2003 National Assessment of Adult Literacy Prison Survey 5-7, 13 (2007), http://nces.ed.gov/pubs2007/2007473.pdf.

In light of the history of the Sixth Amendment and recognizing the fact that lawyers are "necessities, not luxuries," *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963), courts have insisted on a broad understanding of the right to counsel. The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence," and this Court has construed "prosecution" to comprehend the pre-trial period, "when consultation, thorough-going investigation and preparation [are] vitally important," in addition to the trial. *Powell*, 287 U.S. at 57 (citing *Burgess v. Riseley*, 13 Abb. N. Cas. 186 (N.Y. Sup. Ct. 1883); and *Batchelor v. State*, 125 N.E. 773 (Ind. 1920)). As this Court has

explained, the right to counsel is essential to a person's ability to "assert *any* other rights he may have." *United States v. Cronic*, 466 U.S. 648, 654 (1984) (emphasis added, citation and quotation marks omitted).

The Court's statement in *Powell* that the right to counsel applies beyond the confines of trial was hardly novel. In *Burgess*, the nineteenth century New York case on which the *Powell* Court relied, the court rejected the argument that a person "committed by a magistrate ... in default of bail" before an indictment was returned was not entitled to see a lawyer. 13 Abb. N. Cas. at 186. The court reasoned:

> It is said, however, that there is no indictment as yet against the relator, and that, therefore, the constitutional provision [guaranteeing the right to counsel] does not apply. This is, also, it seems to me, a narrow interpretation of the fundamental law. The relator is in jail and adjudged probably guilty of a grave crime.

Id. at 188. The court pointed out that the accused, even before indictment, has rights: "He may claim, perhaps, that his detention is illegal; that the evidence taken before the magistrate was insufficient, and may desire, through counsel, to obtain a writ of *habeas corpus*, or some other process to inquire into the legality of his imprisonment." *Id.* To protect these rights, the right to counsel should be construed to extend to "any and every step which may be taken to inquire into the imprisonment.... This construction is demanded by every consideration of humanity, and the enlightened

views of personal rights resulting from Christian civilization." *Id.* at 188-189.

In *Batchelor*, too, the court held that an accused had been denied the right to counsel when, after arrest but before indictment or arraignment, he had repeatedly asked to see a lawyer but had been refused. 125 N.E. at 775. The grand jury indicted him on the fifth day following his arrest, and he was brought that day before the court to be arraigned, where he was told he had a right to a lawyer. *Id.* at 774-775. He pleaded guilty without asking for a lawyer. *Id.* at 775. In reversing his conviction, the court held that he had been denied the right to counsel, noting the time he had been in custody without being permitted to see a lawyer despite his requests. *Id.* at 776.

The cases confirm that the underlying purpose of the Sixth Amendment is to provide a person with the assistance of counsel to contest government-imposed restraints on liberty; it is not merely a right to legal assistance at trial. That is why, as the *Burgess* court explained, a jailed individual may meet with his lawyer to ask the lawyer to file a petition for a writ of habeas corpus prior to an indictment—the long-established method to challenge restrictions on liberty. *See* Akhil Reed Amar, *Sixth Amendment First Principles*, 84 Geo. L.J. 641, 705 (1996) (explaining that an accused may need to file a petition for a writ of habeas corpus if he is detained prior to trial); *Gerstein v. Pugh*, 420 U.S. 103, 115 (1975) (noting that at common law, "[t]he initial determination of probable cause ... could be reviewed by higher courts on a writ of habeas corpus" (citations omitted)). As discussed in part I.A, *supra*,

consistent with this broad understanding of the right to counsel, this Court has long held that the right attaches at the beginning of adversary proceedings—that is, as soon as a person truly needs counsel to protect his interests. *See Brewer*, 430 U.S. at 398.

Indeed, it would be contrary to the most fundamental principles of our legal system to conclude that, in a garden-variety criminal case, a person could be arrested and committed to jail by a magistrate, but denied access to a lawyer to file a petition for habeas corpus simply *because* the state decided to hold the person without indictment or trial. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 554-555 (2004) (Scalia, J., dissenting) ("The very core of liberty secured by our Anglo-Saxon system of separated powers has been freedom from indefinite imprisonment at the will of the Executive."). Yet that is effectively what the court below decided—since he had no evidence of the prosecutor's prior involvement in his case, Rothgery had *no right to counsel at all* until the indictment was filed. *See* Pet. App. 12a. The Sixth Amendment's history and purpose compel a much broader understanding of the right to counsel: the right to counsel must be understood to be a right to counsel when the government has decided to take one's freedom away.

B. This Court should declare that, following a warrantless arrest, the right to counsel attaches, at the latest, once a court has found probable cause to commit an accused to custody.

There is a very straightforward way of determining whether counsel is necessary to defend an individual's freedom—look to whether a court has

imposed restrictions on that freedom. Specifically, *amici* urge this Court (consistent with the history and purposes of the Sixth Amendment set forth above) to hold that, following a warrantless arrest, the right to counsel has attached when a judge has determined that there is probable cause to believe the person has committed a crime and has imposed significant restrictions on a person's liberty.

Such a rule is supported by this Court's approach in *Gerstein* and *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991). *Gerstein* held that a person arrested without a warrant must be "promptly" brought before a magistrate for a judicial determination of probable cause, if the state wishes to impose any significant restraint on him prior to trial. *Gerstein*, 420 U.S. at 125; *see also McLaughlin*, 500 U.S. at 53. *McLaughlin* clarified what qualified as "prompt" under *Gerstein*, holding that a person presumptively may not be held more than 48 hours following arrest without a judicial determination of probable cause. *McLaughlin*, 500 U.S. at 47, 56. The Court's decision in *McLaughlin* simplified the determination required under *Gerstein*, and a similar clarification for when the right to counsel attaches will likewise assist the lower courts.

Additionally, the reasoning of *Gerstein* and *McLaughlin* is substantially applicable here. *Gerstein* explained: "The consequences of prolonged detention may be more serious than the interference occasioned by arrest. Pretrial confinement may imperil the suspect's job, interrupt his source of income, and impair his family relationships. Even pretrial release may be accompanied by burdensome conditions that effect a significant restraint of

liberty." *Gerstein*, 420 U.S. at 114 (citations omitted). *McLaughlin* held that 48 hours is a reasonable measure of the "prolonged detention" that cannot constitutionally be imposed without a judicial determination of probable cause. *See McLaughlin*, 500 U.S. at 56; *see also Gerstein*, 420 U.S. at 125 n.26 (explaining that the "key factor is [whether there is] significant restraint on liberty").

These decisions recognize that a person's right to liberty speaks more forcefully after he has been restrained for more than 48 hours. He is, therefore, entitled to a judicial proceeding before his liberty can continue to be significantly restricted. And, as set forth above, once a person's liberty has been significantly restrained in a judicial proceeding, he has need of, and is entitled to, counsel to defend that liberty.

Accordingly, this Court should declare that, following a warrantless arrest, a person has a right to counsel following a *Gerstein* hearing if the hearing results in the continuation of significant restraints on the person's liberty. Such a rule is consistent with this Court's precedents, which emphasize that the right to counsel attaches as soon as judicial proceedings have commenced against an accused, no matter how those proceedings might have commenced. *See, e.g.*, *Brewer*, 430 U.S. at 398 ("Whatever else it may mean, the right to counsel granted by the Sixth and Fourteenth Amendments means *at least* that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been *initiated* against him—*whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.*")

(emphasis added, citations and quotation marks omitted); *see also supra* part I.A. It would also simplify the determination a court must make. *See* Pet. App. 6a (the court below discussing its need to discern the "sometimes elusive degree to which the prosecutorial forces of the state have focused on an individual") (citation and quotation marks omitted). It would also establish as beyond question the right of a person incarcerated for a prolonged period prior to trial to the assistance of counsel.

Amici do not suggest that a person is entitled to appointed counsel at a *Gerstein* hearing. In *Gerstein* itself, the Court concluded that an accused did not have the right to have counsel present at the hearing it required. *Gerstein*, 420 U.S. at 122. On the other hand, whether counsel is required at an initial hearing depends on the nature of the hearing. Thus, in *Moore v. Illinois*, 434 U.S. 220 (1977), the Court held that the state was required to provide counsel at an initial appearance—during which a judge decided whether to bind the accused over to the grand jury and set bail—when the hearing was a somewhat more formal affair. *See id.* at 222-223, 226-229.

Whether or not the Constitution requires counsel to be present at the specific initial hearing or arraignment held under a given state's procedures or in a given prosecution, "[t]he question whether arraignment signals the initiation of adversary judicial proceedings ... is distinct from the question whether the arraignment itself is a critical stage requiring the presence of counsel." *Jackson*, 475 U.S. at 629 n.3. In *Jackson*, the Court specifically noted that it was not confronted with the question of whether counsel was required *at* the arraignment,

but it nevertheless had no trouble concluding that the arraignment in question caused the right to counsel to attach. *Id.*

Consistent with the *Jackson* Court's observation, once the government has determined that it will restrain a person's liberty for more than 48 hours and has provided him with a *Gerstein* hearing or some other judicial hearing, he should have a right to counsel, regardless of whether counsel was required at that hearing. Again, that this is the appropriate timeframe follows from *McLaughlin* and *Gerstein*. In effect, if the government does not release a person following his *Gerstein* hearing, it has said: "We are restraining you because we believe you have probably committed a crime." Or, as the court in *Burgess* put it, the accused's liberty is restrained because he has been "adjudged probably guilty." 13 Abb. N. Cas. at 188. It is at that point that a person needs counsel to defend his liberty. The Sixth Amendment, properly understood, protects that right.

The proposed rule is also consistent with this Court's decisions in *Argersinger v. Hamlin*, 407 U.S. 25 (1972), and its progeny. Those cases hold that, in any criminal prosecution where a person's freedom is at stake, even for a single day, he is entitled to counsel. *Id.* at 33; *see also Glover v. United States*, 531 U.S. 198, 203 (2001) ("*any* amount of actual jail time has Sixth Amendment significance") (emphasis added). As the Court explained, "incarceration [is] so severe a sanction that it should not be imposed ... unless an indigent defendant ha[s] been offered appointed counsel." *Scott v. Illinois*, 440 U.S. 367, 372-73 (1979). Indeed, a person may not even be

given a suspended sentence of imprisonment without first being provided counsel. *Alabama v. Shelton*, 535 U.S. 654 (2002).

Given that an uncounseled accused may not be sentenced to even a day's confinement following trial, the only justification for denying a jailed person a lawyer *prior* to trial should be practical considerations akin to the practical considerations that underlay the decision in *McLaughlin*. *McLaughlin*, however, held that those practical considerations permit the government to hold an accused for only up to 48 hours based on a police officer's reasonable determination of probable cause. After that point, the accused is entitled to the protections of the judicial system, and he may not be held longer without a neutral magistrate's determination of probable cause. Once that determination is made and the accused's liberty is restrained, he should be entitled to the assistance of counsel without the need to further parse the nature of the proceedings already held or to be scheduled or to determine the identities of which state actors might have been involved to that point.

Under the Fifth Circuit's rule, any defendant who cannot prove that a prosecutor was involved in pre-indictment proceedings could languish in jail, awaiting indictment. While this Court's precedents demonstrate that adversary judicial proceedings had been commenced against Rothgery at his initial arraignment, this Court should clarify that the hearing required by *Gerstein* and *McLaughlin* triggers the right to counsel to attach, if it has not already attached, if the hearing results in a continuation of substantial restrictions on a person's

liberty.[5] This Court's precedents do not require a state to provide counsel immediately upon incarceration, but the Sixth Amendment does not permit states, no matter what procedures they may employ, to impose significant restraints on people's liberty for extended periods before trial without providing them with access to counsel. The Court should leave no doubt: the Sixth Amendment does not require a person to wait in jail for months, awaiting the day a "Dickensian bureaucratic machine ... churns its cycle," *see McLaughlin*, 500 U.S. at 71 (Scalia, J., dissenting), and a prosecutor finally picks up the accused's file and obtains an

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[5] *Amici* do not suggest that the right to counsel attaches in those cases where a person arrested for a petty offense is bailed at the police station and given a so-called "appearance ticket" or the like, required merely to appear before a court at a later time where proceedings against him will commence (and where, if the state decides to consider imprisonment, the right to counsel will attach, consistent with *Argersinger*). Under the rule *amici* suggest, the right to counsel does not attach when a person is admitted to bail if there has not been a judicial determination of probable cause (or other judicial proceeding) and if the imposition of bail does not carry with it restrictions other than that he appear before a court at a later time. *See Gerstein*, 420 U.S. at 125 & n.26 (no probable cause determination is necessary when there are no "significant pretrial restraint[s] of liberty.") It is the judicial determination of probable cause, which is constitutionally required for significant pretrial restraints on liberty, that initiates adversary judicial proceedings, and which therefore causes the right to counsel to attach. Likewise, if the government does not wish to subject the accused to a risk of imprisonment, the right to counsel does not attach (although it should attach if, not being able to post bail, the person is confined). *See Scott*, 440 U.S. at 373-374 (a person has a right to counsel if he may be subject to imprisonment).

indictment against him, so that he may at last have a right to a lawyer to defend his liberty.

* * *

Some have criticized this Court's criminal procedure jurisprudence as being more protective of the guilty than the innocent. *See* Amar, *Sixth Amendment First Principles*, 84 Geo. L.J. at 644-648; *see also McLaughlin*, 500 U.S. at 71 (Scalia, J., dissenting). This is a case where an innocent man spent weeks in jail—and months subject to other restrictions on his liberty—only because he could not afford a lawyer and the state refused to provide him with one. The Sixth Amendment should be, and traditionally has been, seen to protect such an innocent person's right to the assistance of counsel in defending his freedom.

The Court should reverse the judgment of the Fifth Circuit and hold that, following a warrantless arrest, a judicial determination of probable cause and the imposition of significant restrictions on a person's liberty cause that person's right to counsel to attach.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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JANUARY 2008